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HOLDING CRIMINALS ACCOUNTABLE: EXTENDING CRIMINAL JURISDICTION TO GOVERNMENT CONTRACTORS AND EMPLOYEES ABROAD

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WEDNESDAY, MAY 25, 2011

UNITED STATES SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 10:04 a.m., in Room SD–226, Dirksen Senate Office Building, Hon. Patrick J. Leahy, Chairman of the Committee, presiding.

Present: Senators Leahy, Whitehouse, Franken, Blumenthal, and Grassley.

OPENING STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

Chairman LEAHY. I know Senator Grassley is on his way, but we have Senators who have to be going in and out with all the other hearings. I will start.

What I want to do in this hearing is to consider the need to ensure accountability for crimes committed by Government contractors and employees abroad. President Obama has been working hard to improve America's credibility in the world, our reputation for justice, and our commitment to the rule of law. But a key component of that important mission is ensuring accountability for those who represent us overseas. Accountability is crucial, not just for our image abroad and our diplomatic relations, but for ensuring our national security.

To promote accountability, Congress must make sure that our criminal laws reach serious misconduct by American Government employees and contractors wherever they act. I introduced in the last Congress the Civilian Extraterritorial Jurisdiction Act, and I will be introducing similar legislation this year.

Tragic events in Iraq in 2007 made clear the need to strengthen the laws providing for jurisdiction over American Government employees and contractors working abroad. In September 2007, Blackwater security contractors working for the State Department shot more than 20 unarmed civilians on the streets of Baghdad, killing at least 14 of them, and caused the obvious rift in our relations with the Iraqi Government.

Efforts to prosecute those responsible for these shootings have been fraught with difficulties. Our ability to hold the wrongdoers in this case accountable remains in doubt. Had jurisdiction for

these offenses been clear, FBI agents likely would have been on the scene immediately, which could well have prevented the problems that have plagued the case.

Other incidents have shown that this Blackwater case was not an isolated incident. Private security contractors have been involved in violent incidents and serious misconduct in Iraq and Afghanistan, including other shooting incidents in which civilians have been seriously injured or killed. In these cases, too, there have not been prosecutions.

In the last Congress, the Senate Judiciary Committee heard testimony from Jamie Leigh Jones, a young woman from Texas who took a job with Halliburton in Iraq in 2005 when she was 20 years old. In her first week on the job, she was drugged and then she was gang-raped by co-workers. Remember, 20 years old. When she reported this assault, her employers moved her to a locked trailer, where she was kept by armed guards and freed only when the State Department intervened.

Ms. Jones testified about the arbitration clause in her contract that prevented her from suing Halliburton for this outrageous conduct, and Congress has moved to change the civil law to prevent that kind of injustice. Criminal jurisdiction over these kinds of atrocious crimes abroad, however, remains complicated, depending too greatly on the specific location of the crime, making prosecutions inconsistent and sometimes impossible. In this case of this gang rape, the only person who got locked up was the woman who got raped. We must fix the law to help avoid arbitrary injustice and ensure that victims will not see their attackers escape accountability.

I worked with Senator Sessions and others in 2000 to pass the Military Extraterritorial Jurisdiction Act and then again to amend it in 2004 so that U.S. criminal laws would extend to members of the U.S. military, to those who accompany them, and to contractors who work with the military.

The next step is to establish clearly that all U.S. Government employees and contractors who commit crimes while working abroad—whether they work with the military or not—can be charged and tried in the United States. As the military withdraws from Iraq and Afghanistan, the American presence in those countries will consist largely of civilian employees and contractors. There has to be accountability. If they are going to represent our Government overseas, then they ought to be bound by the same laws that you and I everybody in this room are bound by. And in those instances where the local justice system may be less fair, this explicit jurisdiction will also protect Americans by providing the option of prosecuting them in the United States rather than to be in hostile local court.

So we have to ensure criminal accountability to improve our national security. Our allies, including those countries most essential to our counterterrorism and national security efforts, have to work with us. Moreover, the talented men and women we need to advance our national security efforts will be more likely to step forward and serve if we stamp out the lawless atmosphere that we see in places like Iraq and Afghanistan. That is why the Civilian

Extraterritorial Jurisdiction Act is supported by people like Ignacio Balderas, CEO of security contractor Triple Canopy.

In the past, legislation in this area has been bipartisan. I hope it will be again. I have been working with the Justice Department to make this legislation better, and I hope we can move forward with it.

[The prepared statement of Chairman Leahy appears as a submission for the record.]

We have been joined by Senator Grassley, and I will yield to him.

OPENING STATEMENT OF HON. CHUCK GRASSLEY, A U.S. SENATOR FROM THE STATE OF IOWA

Senator GRASSLEY. Thank you, Mr. Chairman. This is a very important hearing. I am glad you are having it. And without a doubt, extending criminal law to Government contractors and employees serving overseas is something that we ought to keep on top of.

It is an important topic given the increased use of Government contractors by Federal agencies in overseas operations. Particularly it has been highlighted in Afghanistan and Iraq, although it would not be limited to those two countries. Holding any individual accountable for crime is an important part of our Committee's jurisdiction. I think we all would agree that anyone who commits a crime should be held accountable and that bringing criminals to justice is one of the most important roles of our Government. However, extending the long arm of American criminal law is an issue that should not be done without significant consideration and caution.

Now, Chairman Leahy and I have worked together in the past to ensure that Government contractors are not given a free pass to commit crimes or to defraud the Government through resources that are entrusted to our country by other Nations because we worked together in 2008 on the Wartime Enforcement of Fraud Act that would have tolled the statute of limitations on fraud offenses that occurred in a war zone. We also worked together to amend the False Claims Act to ensure that funds that were under the trust and administration of our own Government were protected from fraud and abuse. That fix was necessary to address a loophole created by the courts in the *Custer Battles* decision where Iraqi funds administered by the U.S. Government were subject to fraud. This was a damaging loophole because it essentially said that contractors were free to defraud the Government as long as the money was from a foreign country that entrusted the U.S. Government to administer it. Ultimately, we closed that loophole in the Fraud Enforcement and Recovery Act, which was signed into law by President Obama.

Today's hearing is no less important because criminal acts committed by U.S. citizens and contractors abroad could threaten our foreign relations. As such, it is right for us to examine the ways we can bring these criminals within the reach of our law. Legislation extending the reach of U.S. criminal law to contractors was introduced in the last two Congresses. Both times that legislation failed to clear both chambers and was never signed into law.

Chief among the concerns at that time was the lack of clear exception for contractors that were employed by the intelligence com-

munity. In 2007, President Bush issued a statement of administration policy citing concerns with legislation expanding extraterritorial jurisdiction over contractors and citing concerns with the impact on national security activities and operations. Similar concerns held up legislation in the last Congress.

I think there is a lot of merit to extending our criminal law to civilian contractors and employees abroad. However, we must make sure that this is done in a manner that is narrowly tailored to specific problems and is not overly broad. Further, we must ensure that we do not harm critical national security and intelligence operations.

Those concerns should be addressed in a proper forum and not necessarily aired in public. However, in the limited scope that we can address that topic in this public forum, I intend to ask some questions about what a carve-out for the intelligence community would look like. I also want to know about how many new resources the Department of Justice will require to implement investigations and prosecutions under a proposed expansion of extraterritorial jurisdiction.

Given the current fiscal situation of the Federal Government, I am concerned that reallocating resources from one side of Justice to another could limit other investigations and prosecutions.

I look forward to the hearing today and, most importantly, I look forward to continuing my working relationship with the Chairman on this very important topic. And I wanted to inform the Chairman that at 11:10 I have an opportunity to speak on the floor, so I will probably miss in part or maybe the rest of this Committee hearing.

Chairman LEAHY. Thank you. There is a lot of that going on today, as you know. I appreciate it. I share your concern about resources, but I also share your concerns about how we define somebody. I would hate to think we would set up a thing where the people who—the gang rape I referred to could say, well, part of our duty is to guard some part of the intelligence service here and escape a crime like that.

Senator GRASSLEY. Sure.

Chairman LEAHY. But we can write that.

Our first witness is Tara Lee, co-chair of DLA Piper's global transnational litigation practices focusing on cross-border disputes. She has worked extensively in defense and Government contract issues abroad, has argued a variety of related cases in both State and Federal court. A former military lawyer, taught battlefield accountability at the U.S. Naval Academy. A member of the International Stability Operation Association, served on several committees of the ABA, addressing the expansion of the Uniform Code of Military Justice and the Military Extraterritorial Jurisdiction Act to cover contracts on the battlefield. Received her bachelor's degree from the U.S. Naval Academy and her law degree from the University of San Diego School of Law.

Ms. Lee, please go ahead. We will put your full statement in the record, but please go ahead.

STATEMENT OF TARA LEE, PARTNER AND GLOBAL CO-CHAIR, TRANSNATIONAL LITIGATION, DLA PIPER LLP (US), WASHINGTON, DC

Ms. LEE. Thank you, Mr. Chairman.

Mr. Chairman, Senator Grassley, Senator Franken, other distinguished Members of the Committee that are not present, I want to thank everyone for the opportunity to appear before you today. I know that each of you shares the deep respect and appreciation that I feel for the men and women of the defense contracting community, and as someone who has served in the Navy, been the spouse of an Army soldier, and is now a member of the contracting community, I want to thank you all not just for the opportunity to speak today but for the work you do for each of those communities.

The issue today—extraterritorial jurisdiction and accountability for contractors—is not and should not be a partisan issue. I think we all share a commitment to serving the national security objectives of the United States and a desire for there to be clarity in the accountability mechanisms that reach our citizens. When that accountability mechanism is focused on those individuals who serve in harm's way on our behalf, whether they be uniformed or not, the obligation to provide them with clarity is especially strong. I am a Naval Academy graduate, a former military lawyer, and a former fellow at the Center for the Study of Professional Military Ethics at the U.S. Naval Academy, where I studied and taught battlefield accountability. In my current legal practice, I both advise companies on mitigating their risks and training their employees to operate in conflict environments, and I represent companies when they face Government investigations and civil or criminal litigation. I have also devoted several thousand hours of pro bono legal work to the representation of victims of war crimes that occurred in Somalia in the 1980s, victims who, because no jurisdiction had the capacity or will to take criminal action, had no hope of achieving redress other than through the civil courts of the United States. Each of these experiences contributes to my very broad perspective on the importance of clarity in criminal accountability mechanisms.

I speak today from the perspective of an attorney who currently manages a law practice group that specializes in representing Government contractors, and I can tell you that in my experience the Military Extraterritorial Jurisdiction Act standing alone and as currently drafted has not quite provided that clarity.

As you know, the Act has been subject to legal challenge as to the breadth of its jurisdiction as it applies on its face only to those contractors who are "employed by or accompanying the Armed Forces outside the United States." Arguably, MEJA by its plain text does not apply to those contractors working for the State Department or for Government agencies except and unless it can be established that they are supporting the mission of the Defense Department.

Clarity and certainty are as important to the contracting community as they are to the Government. Companies have an obligation to their employees to properly advise them of the legal rights, risks, and accountability mechanisms to which they are subject when serving overseas. A continued absence of clarity on whether MEJA applies to civilian employees working on non-DOD contracts

does not serve the interests of the contracting community or its employees. For example, a company with both DOD and State contracts might, under the current statutory framework, accurately advise employees working on its Defense contracts that they "are" subject to MEJA jurisdiction, while advising employees doing similar work in the same location but on a State Department contract that they "might be" subject to MEJA jurisdiction. Neither the statute itself nor the limited number of available judicial interpretations makes the effective reach of MEJA completely clear. Thus, the Civilian Extraterritorial Jurisdiction Act that is discussed has the potential to provide more certainty regarding the application of U.S. criminal law to overseas contractors.

Not only might CEJA provide more jurisdictional certainty, it could also enable the prompt and professional investigation of potential criminal incidents. Contractors, as you know, often operate in unstable environments where the host nation capacities for criminal justice functions are limited or developing. Those companies are much better served, in my opinion, if adequate U.S. Government resources are available to assist with or provide the criminal investigation function. CEJA also potentially authorizes the personnel and resources to address that need.

I believe you have received or will receive written statements of support from several companies directly, and as the Chairman noted this morning, Iggy Balderas, the CEO of Triple Canopy and the former command sergeant major of Delta Force, has an op-ed in the Huffington Post discussing the need for CEJA-type legislation, and he argues very persuasively that the absence of effective accountability for contractors puts our country's ability to achieve our goals at risk.

Additionally, CEJA-type legislation also has support from the International Stability Operations Association, a trade organization representing stability operations contractors, as well as from organizations in the human rights community. The Commission for Wartime Contracting also recently called for clarification in criminal jurisdiction over civilian agency contractors. This diverse recognition of the need for an appropriately crafted CEJA reflects, I think, the universal recognition that accountability for criminal wrongdoers is a critical component of securing our Nation's foreign policy goals. No one wants to operate in an environment of uncertain legal clarity, least of all companies who are already operating in often unstable environments.

Thank you again for the opportunity to discuss this important topic with you today, and I do look forward to answering any questions that you all might have.

[The prepared statement of Ms. Lee appears as a submission for the record.]

Chairman LEAHY. Well, thank you very much, Ms. Lee.

I am going to have each one testify, and then we will go to the questions. The next person to testify is Geoffrey Corn, Associate Professor of Law at South Texas College of Law in Houston, Texas, retired Lieutenant Colonel, served with the U.S. Army's Judge Advocate General Corps. Prior to his retirement, he served as special assistant to the U.S. Army Judge Advocate General for Law of War Matters, acting as the Army's senior law of war expert. He also

served as the chief of international law for the U.S. Army-Europe, chief prosecutor for the 101st Airborne Division, and a professor of international and national security law at the U.S. Army Judge Advocate General School. He has been extensively published on national security law, criminal procedure, law of armed conflict. Professor Corn received his law degree from George Washington University School of Law, his LLM from the U.S. Army Judge Advocate General School.

Professor, it is good to have you here and thank you for coming. We will put your full statement in the record, but please go ahead, sir.

STATEMENT OF GEOFFREY S. CORN, ASSOCIATE PROFESSOR OF LAW, SOUTH TEXAS COLLEGE OF LAW, HOUSTON, TEXAS; LIEUTENANT COLONEL, USA, RETIRED

Professor CORN. Thank you, Mr. Chairman and Members of the Committee, for offering me the opportunity to share my perspective of the importance of enacting the Civilian Extraterritorial Jurisdiction Act.

As a soldier and a military staff officer, I was taught to express my "bottom line up front," and my bottom line is that Congress should enact CEJA because it is in the best interest of our national security, our Armed Forces, and potential criminal defendants.

Prior to 1970, trial by court-martial was the primary mechanism by which we held accountable civilians accompanying the military during operations abroad. However, as a result of an opinion by the Court of Military Appeals in 1970, in the case of *United States v. Averette*, that jurisdiction was severely restricted when the Court held that it only applied during periods of formally declared wars.

As a result of this opinion, an entire generation of judge advocates learned that it was almost inconceivable that civilians would ever again be subjected to trial by court-martial. But this created a Federal jurisdictional gap, and the impunity for civilian misconduct created by this gap became apparent as the U.S. military focused increasingly on expeditionary operations in the decade following the end of the cold war. In response, Congress enacted MEJA, a law that reflected a clear preference for Article III criminal trials when civilians accompanying the military committed misconduct while operating abroad.

However, the perception of contractor impunity arose during operations in Iraq and Afghanistan, and these perceptions were in large measure the result of a jurisdictional gap that existed in MEJA. Partially in response to this perception, Congress in 2006 amended the Uniform Code of Military Justice to reverse the opinion of *United States v. Averette* and resurrect military jurisdiction over civilians accompanying the Armed Forces in the field during any contingency military operation.

This resurrection of military jurisdiction caught military experts by surprise. While the resurrection of military jurisdiction over civilians accompanying the Armed Forces is likely constitutional, I believe that it does pose some serious constitutional questions, most significant of which is whether or not it is legitimate to try a U.S. civilian by court-martial when that is not a requirement of

absolute necessity, when an alternate option of Article III jurisdiction is viable.

Now, this is not to suggest that I believe that a court-martial is not a fair tribunal. In fact, I think courts-martial are fundamentally fair. But the fact remains that a court-martial does not afford the full range of constitutional rights to a defendant as are afforded in an Article III criminal tribunal.

It is because of this that I believe it was critically important to enact MEJA. However, MEJA was based on an assumption that has become increasingly stale: that civilians present in areas of military operations will be connected to the military by employment or contract. Civilians supporting the complex missions of today, although often operating in close proximity to the military, are routinely connected to other Government agencies.

CEJA is, therefore, necessary to complement MEJA. Its enactment will ensure all civilians present in operational areas are subject to Federal civilian criminal jurisdiction.

CEJA would also provide a means for prosecuting acts of serious misconduct committed by civilians associated with U.S. Government activities in more mature theaters or areas, not necessarily in countries where we have ongoing military operations. And I believe the ability to exercise such jurisdiction would be beneficial to the United States because it would give us the opportunity to leverage the host nation to forgo criminal prosecution of American citizens who commit serious misconduct and give us the opportunity to prosecute them in the United States, which I believe is often in the best interests of the Nation and the criminal defendants.

Ultimately, I can see no good reason not to enact CEJA. I believe enhancing the scope of Federal civilian jurisdiction over civilians abroad is an important means of limiting resort to military jurisdictions to only those situations of genuine necessity. MEJA was the first step to achieve this goal; CEJA will be the next step. Unless Federal criminal jurisdiction is comprehensive, pressure to resort to the broad grant of military jurisdiction over civilians resurrected by the 2006 amendment to the Uniform Code of Military Justice is almost inevitable. It is, therefore, in the interests of the Nation, the military, and potential civilian defendants to enact CEJA.

Thank you.

[The prepared statement of Professor Corn appears as a submission for the record.]

Chairman LEAHY. Thank you, Colonel, Professor. I appreciate your perspective.

Our next witness is Michael Edney, Of Counsel at the law firm of Gibson, Dunn & Crutcher, where he specializes in appellate and constitutional law, criminal and regulatory defense, and complex civil litigation. From 2000 to 2009, he provided legal advice to the National Security Council and senior White House advisers. Prior to his time at the White House, Mr. Edney worked in the Department of Justice's Office of Legal Counsel. Bachelor's from the University of Notre Dame, law degree from the University of Chicago Law School.

It is good to have you here, sir. Please go ahead.

STATEMENT OF MICHAEL J. EDNEY, OF COUNSEL, GIBSON, DUNN & CRUTCHER, LLP, WASHINGTON, DC

Mr. EDNEY. Thank you, Chairman Leahy, Ranking Member Grassley, and distinguished Members of the Committee. I appreciate the opportunity to testify on this important subject.

With troops deployed in two foreign theaters of combat, holding accountable representatives of the United States who engage in serious misconduct abroad is a recurring and complex matter. Current Federal criminal law leaves a gap for U.S. Government employees and contractors unassociated with the Department of Defense. This gap has raised serious foreign policy problems and problems with the uniform administration of justice. So the Congress and the executive branch have struggled with whether and how to fill that gap through at least two administrations. That is because it is a difficult question and caution is very necessary in addressing it. Expanding wide bands of Federal criminal law abroad to employees and contractors of all Federal agencies, including our intelligence community, could threaten vital national security operations if not done with exceptional care.

I want to make three points, my written testimony aside.

First, the Congress——

Chairman LEAHY. And your written testimony will be part of the record in full.

Mr. EDNEY. Thank you, Mr. Chairman.

First, the Congress historically has been very careful in assigning relevant criminal laws' extraterritorial effect, in part to protect national security operations. Instead, the Congress has extensively studied, often after lengthy classified briefings and hearings, the procedures and restrictions to be placed on overseas intelligence operations. The Congress should continue that practice. Proposed legislation addressing the problems such as security contractor misconduct abroad ought not have unintended side effects on authorized national security activities.

The solution has been laid out by the Assistant Attorney General for the United States, Lanny Breuer, in his forthcoming testimony, and I agree with it. Any legislation expanding general criminal law abroad should have a strong exception for intelligence or other national security operations. Whatever additional restrictions should be placed on intelligence activities, we should wait for a setting where the Congress is exclusively focused on that issue.

Notably, finding an appropriate intelligence exception was the sticking point when this type of legislation came up in the 110th Congress during the last administration. The current administration's position appears no different from the last. Creating an appropriate intelligence exception would be an important step forward in moving this legislative project.

Second, ambiguity in criminal laws applicable to our intelligence officers should be avoided. Using criminal offenses created for what is called the special maritime and territorial jurisdiction of the United States creates particular concerns in this regard, and this is a common theme in legislation that has been designed to solve these problems from MEJA to some of the current legislative proposals. This is a body of law that Congress created for when the Federal Government is the only authority for foreign military bases

and embassies where there is no U.S. State Government. In a city here at home, these are the public order offenses that we would expect, but they were never meant for intelligence operations, and we have no tradition that would assist us in applying them to this new field. The Military Extraterritorial Jurisdiction Act avoided this problem by keeping the Uniform Code of Military Justice and its long history of governing violent armed conflicts as the primary regulator of the military itself. There is no such easy solution for the intelligence community, which does not have this tradition.

The result of such potential ambiguity is the chilling of intelligence operations and the delay required to obtain clarity. Intelligence officers will not and should not have to rely on after-the-fact prosecutorial discretion to carry out necessary operations. They will seek the opinion of the Justice Department in advance. How those legal questions should be resolved is not clear, and that process will take time while national security operations wait.

Third, if legislation imposes new criminal restrictions on intelligence operations, any cases that follow likely will involved classified information. Such cases will place additional strain on the Classified Information Procedures Act. That Act was enacted in 1980 to prevent graymail in espionage cases. Senators on this Committee have proposed changes to update CIPA for the last 30 years. The expansion of Federal criminal law that CEJA contemplates and CIPA reform have to go hand in hand.

Thank you for the opportunity to testify on this topic again, and I look forward to the Committee's questions.

[The prepared statement of Mr. Edney appears as a submission for the record.]

Chairman LEAHY. Well, thank you very much.

Let me begin. This question I will actually ask to Ms. Lee and then to Professor Corn. You talked about the fact that the U.S. has more Government contractors working overseas than ever before. We know the legal framework is unclear. It is outdated. When the military mission in Iraq winds down, and Afghanistan for that matter, the American presence there will no longer be primarily military or DOD contractors, but we will have thousands of civilian contractors and employees, so our criminal jurisdiction will no longer extend to these contractors and employees.

Does that military wind-down in Iraq create urgency to pass CEJA, Ms. Lee?

Ms. LEE. Thank you, Mr. Chairman. That is a very valid point. It is very timely, and it is one that I can tell you that the contractors operating in that environment are very attuned to. You know, how is this going to work in the absence of the Department of Defense? In what ways should we adjust the advice that we give our employees? In what ways do we need to be aware that this will change the legal universe in which we operate?

I think the departure of the Department of Defense limits the application of any UCMJ good order and discipline type authority to the environment and does make it particularly important not just for the contractors to understand what jurisdiction will apply to them in the absence of the Department of Defense, but also for the host country perceptions.

Chairman LEAHY. Well, let me ask you on this, you would be in all likelihood called upon to advise some of these companies. With the passage of a very clear CEJA, would that make your job easier to say, okay, these are the bright lines, this is what you can do, this is what you cannot do? And I realize that is kind of a leading question, but also make it easier to tell the host country.

Ms. LEE. There are two parts of it, and I smiled when you asked the question because it does sort of work counter to my interests, right? As a lawyer of the defense contractors, if statutes are unclear I am in business all day long. That is what we do. If you have got some——

Chairman LEAHY. I was thinking that.

Ms. LEE. Yes. If there is lack of clarity in a statute, I stay busy all day. But on behalf of the companies that I represent, I think you do have an opportunity to clearly articulate your intent here, and that is always a good thing.

I also think it is a good thing from the host country perspective because I think what we have seen is that if there is just the perception of a culture of impunity, then that is a very dangerous thing for the countries that have to operate in that environment, for the military members that have to operate in that environment, and for the furtherance of our bigger national security objectives.

Chairman LEAHY. Professor Corn, how do you feel about that?

Professor CORN. Senator, my concern is that although we draw down in these missions, the military will still have some presence in these locations, and if there is no viable civilian criminal jurisdiction for acts of serious misconduct, the military may be pushed into the role of becoming the primary prosecutorial response to such misconduct, and I think that would be unfortunate.

I am not willing to say that the exercise of military jurisdiction over a civilian is per se unconstitutional, but I think that it is in the interests of the military and civilian defendants to have a jurisdictional scheme that ensures that such jurisdiction is exercised only as a measure of true last resort.

I think the other factor that goes into this, which dovetails with what Ms. Lee mentioned, is that if we do not enact MEJA, there really will be an inconsistency between the method of dealing with military misconduct and civilian misconduct, unless the military is the primary prosecutorial authority. And by that I mean if there is an act of serious misconduct in Iraq by a contractor where there is no Federal civilian jurisdiction, the military member who commits the same misconduct will be tried in an American court—a military court but an American court. That civilian may have no option other than to be turned over to the host nation authorities for prosecution, and that could create a perception of disparate treatment.

I saw this once when I was the legal adviser, the international law adviser in Heidelberg, Germany, for U.S. Army-Europe with the allegation of a rape by a contractor in Bosnia—or it was Kosovo, I think, prior to the implementation of MEJA, and the military commander had a very difficult dilemma because if we did not allow the local authorities to assert jurisdiction, there was no jurisdiction to assert.

Now, ultimately the case was disposed of because the allegation fell apart, but I can remember the debates with the commanding general over, "What am I going to do? If this is true, I do not want this person to have impunity for it." And so having CEJA would create a viable, credible alternative, which would be trial in Federal district court.

Chairman LEAHY. Mr. Edney, do you agree or disagree?

Mr. EDNEY. I do not disagree with that. I think, Senator, as you point out, the more civilian contractors and employees we have overseas in these operations and in these difficult areas, the more poignantly the gap in current Federal criminal law will be raised. The question is: How do we go about filling it?

Chairman LEAHY. Well, I understand that. I also, though, worry about we also do not want to give blanket immunity. I obviously talked about a serious case with Halliburton at the beginning of my statement, but I hate to see something like that just be ignored. My life was easy, the 8 years I spent as a prosecutor. In the United States, when a crime is committed, you go and prosecute people you think committed the crime. Here you have a real difficulty. How do you approach it? As Professor Corn just mentioned, you also have the thing—and Ms. Lee has, too—that sometimes in situations where there is going to be prosecution, the defendant might much prefer it is going to be before an American court with our usual experience. We have seen some highly publicized cases abroad where you wonder how in heaven's name those are done, even close allies of ours. I think of one that has dragged on for a couple of years in Italy on a case where a young woman is accused of murder, and when her parents pointed out the fact that the prosecutor had been involved in ethical misconduct, something that even the courts there had said, then the prosecutor wanted to prosecute them for defamation. I think I would much rather be having the trial here in the United States. But that is my view.

Senator Grassley.

Senator GRASSLEY. Mr. Edney, you described how a carve-out for intelligence was important. What are the potential pitfalls that we face if we pass legislation extending Federal criminal law to contractors abroad without a carefully crafted carve-out for intelligence and national security?

Mr. EDNEY. Thank you, Senator Grassley. One of the problems is that it is difficult here and it is, I think, difficult period to really account for all the many ways that the criminal laws that we draw up for the United States might apply to otherwise authorized national security operations. So that has to be very carefully studied. That is why the previous administration and I believe this one supports leaving those questions for another day and finding an intelligence carve-out that protects those activities.

If you had an intelligence carve-out that focused on authorized intelligence activities or authorized national security operations, you would avoid the situation that Chairman Leahy pointed out in his initial statement where a security contractor that claims he was protecting somebody in the intelligence community but went off the reservation on a frolic, and clearly serious misconduct would not be covered by that. That is the key. The key is it has to be sufficiently simple that the intelligence community continues only to

worry about the authorities they are currently working under and any further authorities or restrictions that this Congress decides are warranted in the specific context of regulating the intelligence community.

Senator GRASSLEY. Well, do you have any idea what steps should be taken in crafting a carve-out or exemption since it has got to be carefully done?

Mr. EDNEY. Yes, I think the first issue is that it needs to be very simple. If it were to become too specific, it would provide points to our adversaries about what is authorized and what is not authorized. It needs to focus on current authorizations. Also, it needs to have an allowance for the reasonable belief of intelligence officials that they are engaging in authorized conduct. And, finally, the important key is that it be drafted in a way that keeps these potential criminal laws off the table because their application to these activities, again, is extraordinarily complicated.

Senator GRASSLEY. You discussed including special maritime and territorial jurisdiction of our country as a basis for applying criminal law abroad. That statute was designed to place the Federal Government in a position of State and local governments and cover general crimes when no State and local government existed. This approach is similar to the Military Extraterritorial Jurisdiction Act utilizing special territorial jurisdiction. You mention in your written testimony a concern that the use of this special jurisdiction is different for civilian contractors as opposed to military members prosecuted under MEJA. What is that distinction? And why is it important?

Mr. EDNEY. Yes, I think this is an important point that the Committee should keep in mind as it turns again to crafting legislation in this area because it is tempting to follow the Military Extraterritorial Jurisdiction Act model, which looked to crimes that would be applicable in the special maritime and territorial jurisdiction of the United States. And as a man from Nebraska, this would be the type of laws that I would expect to govern my activities while I am living in Omaha and that would be supplied by the State legislature to keep me safe. But their application to intelligence activities—and military activities for that matter—are very complicated.

The way that MEJA dealt with this problem was to maintain the primacy of the Uniform Code of Military Justice. That happens in 3261(d) of Title 18. It says that if you are subject to the UCMJ, it is the UCMJ alone that will govern you. And after a long history of dispensing justice to members of the military while they are abroad conducting combat operations, we have a lot of case law that in a sophisticated manner deals with violent combat operations. But we do not have that outlet for the intelligence community. There is no substitute that you can resort to. So the impulse to look at to the special maritime and territorial jurisdiction set of criminal offenses would be a difficulty if you are expanding the criminal law beyond the Department of Defense to all Federal Government agencies, including the intelligence community.

Senator GRASSLEY. Could I ask one more question?

Chairman LEAHY. Of course.

Senator GRASSLEY. If Congress failed to include an intelligence exemption in the legislation and relied upon the prosecutorial discretion of the Justice Department, would that have an impact on the intelligence community? For example, would they have to ask the Justice Department to provide legal opinions? And if the intelligence community became reliant on the Justice Department to pre-approve intelligence operations, would it have a chilling effect on that community?

Mr. EDNEY. I think that you seize on a very important point, Senator Grassley. As I mentioned, the application of these criminal offenses, as they would be to military operations, to intelligence operations, will be very complicated. There are a lot of common-law doctrines and affirmative defenses such as justification and public authority that the Justice Department would have to sort through, and as I mentioned in my initial statement, we can expect that the intelligence community will turn to the Justice Department first to sort that out. That will take time, and it will require a pretty significant exercise of discretion. And I think what you will see is that it would transfer a lot of responsibility about what intelligence operations occur from the senior executive branch officials that this Senate confirmed to oversee those operations to the Attorney General because he will have a very wide legal interpretive task in advance before he approves those operations.

I think we can also expect that the Justice Department will not provide general guidance in this area, as they should not. These legal inquiries, if many of these Federal criminal laws were applied, require very fact-specific issues, and it would be kind of a de facto reorganization of the way that we conduct the international security operations if the Federal criminal laws that we are considering applying to intelligence agencies were not selected with great care.

Senator GRASSLEY. Thank you, Mr. Chairman.

Chairman LEAHY. Thank you very much.

Senator Franken.

Senator FRANKEN. Thank you, Mr. Chairman.

Ms. Lee, it seems pretty obvious to me that we are going to be depending on private contractors who work overseas more and more—as we pull out of Iraq. They will be tied to the State Department, and we have to make sure they are accountable to U.S. laws. Unfortunately, the actions of a small number of bad actors have tarnished the entire reputation of the contracting community, which you represent.

You said in your testimony that the companies you represent would welcome greater certainty and clarity on the application of U.S. criminal laws to their employees. I would like you to explain this a bit more. You talked about the culture of impunity. Now, the Chairman talked about Jamie Leigh Jones and KBR and Halliburton. Jamie Leigh Jones was gang-raped by KBR employees. What I understood was that this had happened many times before, and KBR insisted that she was required to go through arbitration.

Now, KBR is no minor player in contracting. Jamie Leigh also formed her own foundation in the 4 years that she was trying to fight to get into court, and part of her foundation was finding and inviting women who this had happened to but who had submitted

to mandatory arbitration. She found 40 women who had been raped by contractors.

You heard all kinds of stories of prostitutes being brought into these contractors, including prostitutes in the host country. Was there a culture of impunity? Is there a culture of impunity? I just want to know. KBR is not a small actor. It is probably the biggest contractor there is. So I am not terribly convinced that this community wants this, but I hope they do.

Ms. LEE. I can tell you I believe that they do, Senator. I want to clarify that I do not represent KBR, never have. And when I speak here and talk about certain things, I am, of course, speaking with my own personal opinion and not on behalf of any individual clients anyway. But I can tell you from my experience not just representing the contracting community but also as a military prosecutor that even a perception of a culture of impunity is, I think, a dangerous thing. And I think that is what I referred to when I spoke before, and that is a potential host country perception of impunity. And that is why the clients that I work with and the trade organizations that represent defense contractors that I work with are all in support of a measure that would move forward for better, more effective accountability across the board, I think because it is fair to say that they recognize, much like you have and many other Senators and many members of the American public have recognized, that it is contrary to the goals of our mission overseas to allow even a perception of impunity to persist.

Senator FRANKEN. KBR was contracting with DOD. As we withdraw from Iraq, more and more will be contractors for the State Department. We passed an amendment in the DOD appropriations that contractors could not exercise their mandatory arbitration clause in their employment contracts if they were getting paid through DOD. Do you think it would be wise in terms of trying to get rid of this culture of impunity if we did the same thing for State?

Ms. LEE. You mean, Senator, specifically for civil liability and civil——

Senator FRANKEN. Yes.

Ms. LEE. Those kinds of things. I think that is something that is within Congress' power to do. I apologize, I am not as familiar with that bill, but I think——

Senator FRANKEN. Well, basically KBR took the position that in her contract with them they had a mandatory arbitration clause on any complaint about employment. They took the position that if she was raped, that was an employment dispute, and they had taken that position with evidently 40 other women. She fought them.

Now, my question is: Do you think that it creates a culture of impunity and would continue to create a culture of impunity if people like Blackwater, or others who are under the employ of the State Department, are able to assert these arbitration agreements for their employees who come under similar circumstances? I am asking you your opinion.

Ms. LEE. And I am happy to give it. I can tell you as a lawyer who practices civil litigation, what I often invite my clients, when they ask me, should we have arbitration clauses in these agree-

ments—and sometimes these are contracts overseas with subcontractors; sometimes these will be arbitration clauses that not just in the defense contracting community but in other industries in the United States are very common aspects of employment contracts. I will tell you my honest experience. I tell a lot of the clients that I work for, most of them, it is not necessarily a guarantee that the proceedings will be cheaper, faster, or easier if they are done by arbitration. Arbitration can be just as expensive and just as adversarial as litigation.

When I represented in a criminal justice capacity victims who were making rape allegations in Uniform Code of Military Justice proceedings, their families would also ask me the same thing. You know, what should we do about this? Should we sue about this? The confluence of those particular types of criminal acts and the way that they are superimposed over civil litigation is a really complicated area, and I think it is not—I do not mean to not answer you directly, but I think it is not pure enough to say that if nobody is allowed to arbitrate, that will improve the perception of impunity. I am not necessarily sure that it will, because I am involved in a lot of arbitrations——

Senator FRANKEN. I think you do not understand my question then, because this is mandatory arbitration. It is not that no one is allowed to arbitrate. You can arbitrate if you like. I would really appreciate an answer to my question, which is: Do you think that the State Department should honor mandatory arbitration? I am not talking about whether a woman has a right to arbitrate. Of course, a woman would have a right to arbitrate. That is not the issue. That is not what I am asking you.

Ms. LEE. And I think I do understand. I think as the clauses read, what they are is arbitration in lieu of litigation. So I think what your objection to them is that it deprives a woman in that position of the ability to fully litigate her claim in a Federal district court or in a State court instead of going to an arbitration proceeding, and that may be an area where you and I disagree as to whether that necessarily means that a person going forward in an arbitration has given up anything that will be of benefit to them or rights to them. Some arbitrations might be structured so that that would be a reasonable conclusion. In my experience they are not always, and so, you know, if there is——

Senator FRANKEN. My time is up, but I am not satisfied with the answer because "not always" is not a satisfactory answer.

Ms. LEE. Well, I can tell you—and I mean this very sincerely—the U.S. litigation process in terms of achieving redress for a claim much like Ms. Jones' is entirely also likely not to be very satisfactory either. And so I think that is all I meant to express, is that I cannot do an either/or for you and tell you that one will definitely help improve a culture of immunity because I think both have flaws.

Senator FRANKEN. I think the woman should have a choice. Thank you.

Thank you, Mr. Chairman.

Chairman LEAHY. What I am going to do, I am going to move now to Senator Whitehouse and then Senator Blumenthal. I am leaving for another hearing. I should note that the issue of arbitra-

tion, I think what we are saying is we have arbitration if it is agreeable to both parties and not imposed on them. But I also agree with what Ms. Lee said, that on both civil and criminal litigations, the results are not always satisfactory. But at least to leave on the table the ability to have both criminal and civil litigation I think is necessary. So I thank Senator Franken.

Senator Whitehouse, you are recognized, and I thank the members of the panel. This is a difficult thing, and your experience is important. I understand, Mr. Edney, you are talking about a carveout. I just do not want to make it such that somebody who happens to be guarding the outside of our station, our CIA station, might suddenly be able to go off and do whatever they want and get that immunity, and I am sure that is not what you are suggesting by any means.

Mr. EDNEY. No, not at all, Senator. I think there are very helpful ways to deal with that particular problem.

Chairman LEAHY. I agree with you. Thank you very much.

Senator WHITEHOUSE. May I proceed, Chairman?

Chairman LEAHY. Yes.

Senator WHITEHOUSE. Mr. Edney, your concerns regarding the consequences of application of this statute to the intelligence community will depend to a significant degree on what the offense is at issue, will it not?

Mr. EDNEY. Yes, it will, Senator.

Senator WHITEHOUSE. So, for instance, our intelligence community is engaged as a matter of ordinary day-to-day business in trying to break into places, steal things, get unauthorized access to information, conspire with people to divulge secrets to us. That is kind of the nature of the intelligence business, to get unauthorized access to information, and so something like that, which is actually not covered by this bill, as I understand it, would be a really significant impediment into our intelligence functions. But as best I can tell, there is no legitimate intelligence function that involves rape.

Mr. EDNEY. No, I think that you are right about that, Senator. I simply cannot think of one, although I will say that the proposed legislation is broader than that.

Senator WHITEHOUSE. No, but that is what I say, you need to start to distinguish among different offenses.

Mr. EDNEY. That is exactly right.

Senator WHITEHOUSE. And you would concede that as to rape the interests of the intelligence community are nil.

Mr. EDNEY. I cannot think of any.

Senator WHITEHOUSE. And as to murder, pretty much also nil, correct?

Mr. EDNEY. Well, that is—I do not know that—I do not know that there is a productive way to talk about this, but I think that there are lots of complicated questions raised by lots of criminal statutes, some of which are included in the proposed legislation from last session.

Senator WHITEHOUSE. But we should be distinguishing between them because different statutes, different crimes will have different impacts, and at least as to rape you can agree that the impact there is nil.

Mr. EDNEY. Yes, and as you point out, you know, this is an important point. I mean, there are actually laws that apply to the intelligence community, and one of them is the War Crimes Act, which Congress amended in 2006 to address concerns that the Congress had, and various types of sexual conduct beyond rape are already prohibited by applicable Federal law, and that is for everybody.

Senator WHITEHOUSE. Yes. Even overseas.

Mr. EDNEY. Yes. As a matter of fact, especially overseas.

Senator WHITEHOUSE. So to the extent that there is an overlay between what is already prohibited by those statutes and what would be prohibited by this law, again, the net effect is nil in terms of a deterrent on intelligence colleagues.

Mr. EDNEY. I would not raise any yellow flag about restating current Federal applicable criminal law that is already applicable to the intelligence community. That is exactly right. And this Committee, as well as other committees, spent a fair amount of time figuring out exactly what those rules are going to be in the specific context of national security operations. That is exactly the type of process that I think needs to happen and should be the practice of the Congress going forward.

Senator WHITEHOUSE. And while I think we will all concede that there could be some either deterrent effect or some delay while legal issues get sorted through in terms of a potential subset of intelligence activities as a result of this statute, are there not also potentially significant national security consequences from the culture of impunity that has been referred to from the degradation of America's standing in the host country from criminal acts that take place from the diplomatic consequences of that, from the failures of either military or intelligence cooperation that might ensue from that, so there are costs on both sides of this equation, are there not?

Mr. EDNEY. There absolutely are costs on both sides. An example of that is——

Senator WHITEHOUSE. National security costs.

Mr. EDNEY. National security and foreign policy costs. An example of that was when this country was trying to negotiate the 2008 Status of Forces Agreement with the Government of Iraq, we were not able to achieve the immunity that we traditionally would like from the Iraqi criminal justice system because of some of the shortcomings in our laws. That at least was a factor, and that is a foreign policy consequence. The way to thread it is to keep these intelligence operations out and focus on the problems that this Committee has identified with security contractors and others that have nothing to do with authorized intelligence operations, and a carve-out can leave what rules apply to the intelligence community when they are carrying out their work for another day in a setting where——

Senator WHITEHOUSE. So your carve-out——

Mr. EDNEY [continuing]. The implications can be fully discussed.

Senator WHITEHOUSE. Your carve-out, your proposed carve-out for the intelligence community would be limited to sanctioned and approved intelligence activities. So if an agency operative, an intelligence operative, were engaged in something that had not been

specifically directed through the chain of command as an approved intelligence activity, that would be a different matter. That would not be part of your carve-out.

Mr. EDNEY. Well, I mean, look, what is in the carve-out is a very complicated matter, and I could tell you from the last administration——

Senator WHITEHOUSE. But it would be authorized things, not unauthorized things.

Mr. EDNEY. I think that focusing on authorized matters or matters that intelligence operators reasonably believe are authorized so they do not get caught up on technicalities would be a very productive way to start and would address the issue of frolic, detour, and clearly unauthorized conduct that Senator Leahy referred to in his opening remarks. I think that is a productive place to start.

Now, I am 2 years removed from——

Senator WHITEHOUSE. We should leave it there because my time has expired, and I am now encroaching on Senator Blumenthal's time, so thank you very much.

Mr. EDNEY. Absolutely. Thank you, Senator.

Senator FRANKEN [presiding]. Senator Blumenthal.

Senator BLUMENTHAL. Thank you, Mr. Chairman, and thank you to the members of this panel for being here today.

Professor Corn, reading your law review article, I was struck by your observation—and I think there is a lot of agreement with it—that essentially the Military Extraterritorial Jurisdiction Act has been largely ineffective. And, in fact, you observe in one of the footnotes that there have been virtually no prosecutions during the Iraqi era. And I wonder if you could expand on the reasons that you see for that lack of activity under this law, whether it is weaknesses in the law or purposeful decisions in the exercise of discretion that we just should not prosecute for whatever reasons relating to intelligence or national security.

Professor CORN. Well, first off, I should note that the law review is a couple of years old, so I think there has been good movement on the implement of MEJA.

As I said in my opening statement and in the statement for the record, I think MEJA was a critically important statute to enact, but I think there was a period of time where we had to ease into its implementation. So I think there have been two challenges with MEJA. One has been that it has been limited in its jurisdiction. That is the challenge that CEJA is motivated to respond to, to close that jurisdictional gap.

The other is implementation. Any law has to be implemented, and MEJA was a complex law to implement because it touched on the interests of both the Department of Justice and the Department of Defense. And there was a period of time when the two agencies were working on an implementing regulation that finally emerged. And that is why when I was in Germany in 2001 MEJA was not yet really a viable response mechanism to this act of civilian misconduct.

My understanding is that the Department of Justice has moved substantially in a positive direction—and I will leave that to the Justice representative—in implementing MEJA. I think personally that whether we are operating under MEJA or if you enact CEJA,

one of the important aspects of implementation is ownership. I will go back to, again, my military training and the importance of unity of effort. MEJA has a split interest and, therefore, you had the military responsible to initiate the case but a U.S. Attorney in the United States responsible to bring the case to trial and bring it to fruition. And I think there are creative ways that that could be streamlined, but, you know, as I understand it, again, much of that has been improved.

I would also note that I think MEJA has been important to reach an issue that was not the primary objective but has been an important issue, which is to address servicemember misconduct that is discovered after the servicemember is separated from the Armed Forces, what I call the infamous Specialist Medlow case. Medlow was one of the participants in the My Lai massacre who went on "60 Minutes" and admitted everything, and there was no jurisdiction to try him. MEJA closes that gap, and there have been very significant prosecutions, one in the Western District of Kentucky for a soldier who was involved in a brutal rape and murder of an Iraqi teenager and then separated from the military before we found out about it.

So I am a huge fan of MEJA, and I think as we grow into MEJA, the implementation process will become more mature and more regular, and that is a very positive thing. But I think if CEJA is enacted, that is an issue that is going to have to be addressed because now it is going to create bifurcated interests between State and Justice or Department of Energy and Justice. So there really has to be unity of effort from the beginning to the end of the criminal investigation and prosecution process. And if there is one great strength of the UCMJ approach, that is it. The military initiates the investigation, assigns the prosecutor, prosecutes the case, et cetera, et cetera.

I think it can be done under MEJA or CEJA, but it just takes a little bit of coordination.

Senator BLUMENTHAL. For that unity of purpose, shouldn't there be a central prosecuting authority? In other words, perhaps these decisions ought to be elevated to the level of the Attorney General rather than have United States Attorneys responsible for them.

Professor CORN. Well, again, I think I am little bit outside of my area of expertise. I think—and, again, I will leave it to the Justice representative. I think that there is something akin to that beginning now with the Department of Justice creating a team of prosecutors that focus on MEJA cases. So even if we prosecute the case in the Eastern District of Texas or, you know, the Western District of Washington, the Department of Justice can detail one of these special prosecutors to the case to assist with the prosecution, which I think is an ideal method.

One of the suggestions I think I made in the article was even within MEJA perhaps you could assign judge advocates as Special Assistant U.S. Attorneys. We do that for civil cases, environmental cases, labor cases that arise in a military installation. And, you know, the military has very fine attorneys and very experienced prosecutors who could periodically be detailed to work in this special team if it would facilitate the effectiveness of the ultimate ob-

jective. But I think the Department of Justice has started that process already.

Senator BLUMENTHAL. Thank you very much.

Thank you.

Senator FRANKEN. Thank you, Senator Blumenthal, and I want to thank these witnesses for their testimony. Thank you all.

We will now move on to our second panel. I would like to welcome a frequent guest of this Committee, Lanny Breuer.

Senator WHITEHOUSE. Mr. Chairman?

Senator FRANKEN. Yes?

Senator WHITEHOUSE. While we are waiting for the witness to come to the table, I wanted to mention that I think one of the reasons that this hearing is so important is the size of our contractor footprint overseas. I do not know if that has been discussed already, but the last time that I was in Iraq, last year, our contractor population was far greater than our military population and our civilian population combined. I do not have the numbers off the top of my head, but I want to say it was 2 or 3 times as great in terms of contractors compared to civilian government employees and uniformed military. So it is a really big piece of what the host country sees out of our American presence there.

Senator BLUMENTHAL. And will increase, Mr. Chairman, even further under the strategy that has been outlined by the United States. So I think Senator Whitehouse's remarks are very apt.

Senator FRANKEN. Very, very good point.

I would like to welcome Lanny Breuer. Lanny Breuer is the Assistant Attorney General for the Criminal Division of the United States Department of Justice. Mr. Breuer started his career as an Assistant District Attorney in New York City where he prosecuted offenses ranging from violent crime to white-collar crime. He later joined Covington & Burling, LLP, where he served as co-chair of the white-collar defense and investigations group. Mr. Breuer served as Special Counsel to President Clinton from 1997 to 1999, an eventful period. Mr. Breuer received his undergraduate degree from Columbia University and his law degree from Columbia Law School.

Thank you for testifying, and go ahead.

STATEMENT OF THE HONORABLE LANNY A. BREUER, ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION, U.S. DEPARTMENT OF JUSTICE, WASHINGTON, DC

Mr. BREUER. Thank you, Mr. Chairman and distinguished Members of the Committee. Thank you for inviting me to speak with you today about the proposed Civilian Extraterritorial Jurisdiction Act, or CEJA.

I am honored to appear before you on behalf of the Department of Justice, where, as you mentioned, I am privileged to lead the Criminal Division's nearly 600 lawyers in enforcing the criminal laws. Together with the Nation's 94 U.S. Attorneys' Offices, the Division's Human Rights and Special Prosecutions Section, HRSP, investigates and prosecutes individuals under the existing Military Extraterritorial Jurisdiction Act, or MEJA, for crimes those individuals commit overseas.

Our commitment to bringing prosecutions under MEJA is evidenced by our record. Since MEJA was enacted, the Justice Department has used it to prosecute numerous Department of Defense employees, contractors, or individuals accompanying them overseas who have committed serious crimes. In *United States v. Steven Green*—and I noticed that the witness right before me alluded to that case—for example, we convicted a former Army soldier for the brutal rape and killing of a 14-year-old Iraqi girl and the murders of three of her family members while the soldier was on active duty in Iraq. In *United States v. Rico Williams*, the Department convicted a former Air Force senior airman for a gang initiation beating that ended in the death of an Army sergeant in Germany. And just this year, in *United States v. Christopher Drotleff*, we convicted two Department of Defense contractors for involuntary manslaughter of a civilian in Afghanistan.

In addition, we have also been able to prosecute individuals for acts committed abroad when MEJA does not apply, in particular, if the conduct occurs within the special maritime and territorial jurisdiction of the United States or falls under a Federal criminal statute with extraterritorial application. We successfully prosecuted, for example, former CIA official Andrew Warren for committing abusive sexual contact while on U.S. Embassy property in Algiers, Algeria.

Although we have accomplished a great deal using our existing laws, MEJA leaves significant gaps in our enforcement capability. The criminal statutes with clear extraterritorial application make up only a subset of the Federal criminal laws, and the special maritime and extraterritorial jurisdiction of the United States is limited. Consequently, a U.S. Government employee who rapes a foreign national in the employee's diplomatic residence may be prosecuted for his crime, while the very same person might not be able to be prosecuted if he commits the exact same crime in the victim's apartment.

Additionally, MEJA applies only when the defendant's employment relates to supporting the mission of the Department of Defense overseas. Therefore, a civilian Government contractor whose employment is unrelated to the mission of the Department of Defense but is related to another agency's mission cannot currently be prosecuted under MEJA, even if he or she clearly committed a serious crime.

Moreover, whether any particular defendant falls within the scope of MEJA depends upon highly specific facts and circumstances relating to his or her employment, and the statutory language has proved in those cases very difficult to apply.

The proposed CEJA legislation would address these gaps by extending U.S. jurisdiction to all non-Department of Defense employees and contractors and those who accompany them who commit crimes overseas. We believe this legislation is critically important. In addition to permitting us to prosecute U.S. Government employees who are currently beyond our reach, the legislation would also show our international partners that we take seriously the conduct of U.S. Government employees within their borders.

Mr. Chairman, we are pleased that you are introducing and this Committee is introducing new legislation to close the gaps in the

law. We fully support the goal of passing a robust and comprehensive CEJA statute that provides clear and unambiguous jurisdiction to prosecute non-Department of Defense personnel for their overseas misconduct without curtailing lawfully authorized intelligence activities.

We look forward to continuing to work with the Committee on such legislation. Thank you for the opportunity to appear before you today, and, of course, I would be pleased to take any questions you may have.

[The prepared statement of Mr. Breuer appears as a submission for the record.]

Senator FRANKEN. Thank you. Thank you, Mr. Breuer.

Mr. Breuer, you suggest in your testimony that CEJA closes a large gap in the law and would make it much easier for the Department of Justice to prosecute egregious criminal acts committed by all U.S. contractors, regardless of the agency that they work for and regardless of whether the crime was committed on a military base or elsewhere overseas. But I am struggling to get my head around how large a gap in the law we are talking about.

How many cases has the Department investigated or issued indictments on that ended up being dropped because of jurisdictional problems? Are we talking about 10 or 20 or 30 or more than 100 cases in the last several years?

Mr. BREUER. Mr. Chairman, I think we have brought probably around 50 or so cases that have been indicted and that we have pursued. I think the real challenge is twofold:

One, I think there are an enormous number of cases or there are probably a good number of cases that are not referred, because from the very start those who hear about the underlying conduct cannot find any kind of Department of Defense nexus. And so I suspect that we just do not hear about them in the first instance.

And the second very troubling issue is in each of the cases where we have gone after some contractor who is not directly working for the Department of Defense, we can spend literally thousands of hours on one case trying to establish that nexus. So instead of investigating the underlying criminality, we have to investigate—and these are very difficult cases—that contractor's nexus to the mission of the Department of Defense. That becomes very burdensome and takes a lot of our resources away. And that is what we hope CEJA will completely eliminate.

Senator FRANKEN. Thank you. When it was first reported back in 2007 that Blackwater security guards allegedly shot and killed a number of Iraqi civilians—the number is somewhere in the teens—in Baghdad's Nisour Square, it seemed like it would only be a matter of time before those guards were tried and convicted. I realize the Department has been hard at work on this case for quite some time, and I want to ask you about some of the jurisdictional hurdles that you encountered. We are preparing to massively increase our reliance on State Department contractors, as Senator Blumenthal was referring to, as we continue to draw down our forces in Iraq.

Given your experience with Nisour Square and similar cases, can you explain how it can be difficult to establish jurisdiction under MEJA, how CEJA might make it better, and relate that to Nisour?

Mr. BREUER. Absolutely. Let me be careful about Nisour Square. It is under active litigation. We just won in front of the court of appeals on an unrelated issue, and so now it is before Judge Urbina here in the district court again. There it was on an unrelated issue, and so I just wanted to be careful. But there is no question even in that case we will be litigating the nexus between those contractors and their mission with the Department of Defense.

Just taking a step back, because we have to relate it to the Department of Defense mission. In any case that we bring with a contractor the first thing that the defense is going to do is say, "Look, we were a contractor for the State Department," or "We were a contractor for the Department of Agriculture. We do not have the sufficient nexus to the Department of Defense." That becomes an incredibly fact-specific inquiry, and it also becomes a very burdensome inquiry in looking at all of the aspects of the underlying contract. And when you assume these cases are halfway around the world, we have to bring our investigators over there. We have to find out what your specific role was. This becomes a very difficult issue to then describe to a district court judge in the United States. And, frankly, I think at least half of our time, if not more, is spent on that very issue.

Senator FRANKEN. As I understand it, part of this legislation is to have investigators in place, right?

Mr. BREUER. Well, I mean, with respect to that, I think we would like to have as much flexibility as we can. But, yes, we will have investigators abroad, and we will have investigators here who we will bring abroad. But if we do not have to litigate the issue of the nexus to the Department, because it is enough that you committed a crime and you were a contractor for the Department of Agriculture, then we are more than halfway where we need to be.

Senator FRANKEN. Thank you.

Senator Blumenthal.

Senator BLUMENTHAL. Thank you, Senator Franken. Thank you, Mr. Chairman. You may have heard some of the remarks as you were coming to the table from me and Senator Whitehouse about the importance of this issue in light of the fact that the United States is withdrawing its military forces from Iraq and, in effect, substituting a civilian force, whether it is characterized as military or not. And so the importance of this issue will only increase, and I think your testimony is very, very important in support of these proposed changes, and I want to thank you for that and also for your service to the Nation and to the Department of Justice now.

I wonder to what extent the barriers here related to confidentiality, security, intelligence, especially in light of what the U.S. Supreme Court basically had to say on this issue just in the past few days.

Mr. BREUER. Sure. Well, Senator, that is a great point. First, let me begin by saying I absolutely agree with you that with the drawdown this will only become that much more important because of the role of civilians. But right now, without CEJA, Senator, even in cases where we try to establish this military nexus, we often actually face the issue that whatever program the contractor may have been involved in is classified. And so we have the very difficult balance with maybe some other aspects of the Government in

determining how much are we willing to reveal about the classified program. And even CIPA, the procedure that the courts have for this, may not be sufficient.

So what CEJA will do is it will eliminate all of that. We will never have to go into the classified aspect of the undertaking, and that is why we think so strongly this will make a very, very big difference.

Senator BLUMENTHAL. And in terms of contractor responsibility, just thinking about the civilian liability of a contractor, to what extent does it now and should it extend to the conduct of employees? In other words, where there are criminal acts, where there are other kinds of misconduct, the focus is on the individual who works for the contractor, for example, in the case of a rape. But should the contractor itself be responsible for the criteria it uses to hire people, train them, and so forth, supervise that kind of activity?

Mr. BREUER. Well, Senator, I guess my view on that would be that the same principles of corporate criminal liability that apply in other contexts I would think should apply here. We hold in all kinds of contexts companies responsible for the criminal acts of their employees. It is very fact specific. But just the other day in a totally other area, in the FCPA, we convicted the first company ever in that context because of the conduct of its employees. So it would be fact specific. I think we would want to look at how high level the conduct was. But, absolutely, it should apply as it does, I think, in other settings.

Senator BLUMENTHAL. And in making these decisions and others, is the top level, such as yourself, the Attorney General of the United States, increasingly involved in making these prosecutorial decisions because they involve such important discretion—as all prosecutorial decisions do, but especially so since the national interest and national security are involved?

Mr. BREUER. Absolutely, Senator. It absolutely gets our attention. Under my tenure I am proud with the help and support of the Congress we combined two sections to create the Human Rights and Special Prosecution Section, HRSP, and we did it because of our commitment in this area. It absolutely gets my attention and, as appropriate, the Attorney General's as well.

Senator BLUMENTHAL. Thank you very much.

Mr. BREUER. Thank you.

Senator BLUMENTHAL. Thank you.

Senator FRANKEN. Thank you, Senator Blumenthal.

Senator Whitehouse.

Senator WHITEHOUSE. Thank you, Chairman.

Mr. Breuer, does the Department have a position on Mr. Edney's recommendation that there should be a carve-out for intelligence activities? And, more specifically, should that carve-out include the crime of rape? Can you identify any situation in which rape is an approved intelligence activity?

Mr. BREUER. No, Senator, I cannot, so rape is off the table. We do think that there should be an intelligence carve-out. We think that authorized intelligence activity has to be permitted to continue, and we do not want our intelligence community feeling as if they are being second-guessed. So we do think there is an appropriate role for the carve-out, but rape absolutely cannot and would

not be a part of that. And, indeed, we will continue to pursue unauthorized activity. If anything, the carve-out makes it that much clearer, the lanes are that much more clear as to what we will pursue, and we will absolutely pursue unauthorized activity.

Senator WHITEHOUSE. And the focus on authorization allows the intelligence agency or agencies itself themselves to make it very clear internally how to provide the necessary legal protection for those authorized activities. That does not require other agencies to get involved. They can take care of their own in that sense by being clear about what is authorized.

Mr. BREUER. I think that is right. I think also, as we know, there is a body of law with respect to what is authorized. Congress has a fair bit to say about that. But I think we do owe it to the intelligence community to give them clear directions, so when they are serving the American people that they do not have to feel that they are being second-guessed, as long as they are working on conduct that is authorized.

Senator WHITEHOUSE. In your organization's experience dealing with these types of situations, are there considerations that we should be alert to that depend on whether the victim is an American or a host country national? Is that a distinction that pertains in any dimension here that we should be paying attention to? Or is that irrelevant?

Mr. BREUER. So I need to think about that more. I have not made that in my own thinking particularly relevant. My view is if you are abroad and you are a contractor and you are working for us, you should be held liable if you commit a crime.

I will say, of course, if you are a foreign national and you have been living in the host country irrespective of the contract and you have just been living there for a long time, then we would not have jurisdiction for you because you would be there. But if you are working for a country, you are in the host country because of the work you are doing for the Government, and you commit a crime—and I would say—the one thing I would say about this is we do think that we should limit CEJA to serious crimes. I think we want to be thoughtful about how we are using our resources. But with respect to serious crimes, I cannot see much of a reason why we have to distinguish your nationality.

Senator WHITEHOUSE. Are there additional resources that would be required for crimes against a host country national in order to permit the host country national themselves as the victim or, if not a surviving victim, their family to participate in the supports that we provide to victims' families in the American criminal justice system?

Mr. BREUER. I think that that is the case, Senator. What we have found in all of the cases we have—we prosecute human rights violators around the world. We deal with these extraterritorial jurisdiction matters. There is just no question that our commitment is very strong, but that these are resource-intensive matters. Getting our witnesses, supporting the victims, all of this is exponentially harder, because we are doing these things across the globe, often. But we are committed to doing it, and we do it, and our lawyers at HRSP and the lawyers in the U.S. Attorneys' Offices are doing an excellent job despite the challenges.

Senator WHITEHOUSE. Very good. Thank you very much.

Thank you, Chairman.

Senator FRANKEN. Thank you, Senator Whitehouse.

Senator Blumenthal, do you have any other questions?

Senator BLUMENTHAL. I have just one question. We do not have any of our Republican colleagues here today, but I can anticipate that one of the issues that may be raised is that this kind of proposal, CEJA, would "discourage" or "deter" contractors from wanting to be involved in doing business and working for the United States.

You are not in the business of contracting, but I wonder if you could address that issue on behalf of the Department.

Mr. BREUER. Of course. I would hope that is not the case, Senator. I would hope that our contractors are wanting to serve, because they want to fulfill their contracts in service of the work for the United States. All we are saying here is that if you are a contractor for the United States and you commit a serious crime in the host country, wherever you are, we need a way to reach you, and that is very important.

I should clarify one point. If you are a citizen of the host country and you are working for us, CEJA would not apply to you. We would rely on the host country. But I cannot imagine that fair-minded people think that this will be a deterrent to working for a contractor.

Senator BLUMENTHAL. I would agree. Thank you very much.

Mr. BREUER. Thank you.

Senator FRANKEN. Thank you, Senator Blumenthal.

Mr. Breuer, I want to thank you and the other witnesses for coming here today to talk about this very important issue, and I look forward to supporting Senator Leahy in marking up CEJA and getting it to a vote on the Senate floor as soon as possible.

I also want to take this moment to thank Senator Grassley for working with me on a GAO request I am planning to file later today related to contractors who have been convicted or found liable for procurement fraud and other misconduct. Mr. Breuer, you may recall that I asked you a number of questions related to suspension and debarment back in January, and I also pressed Attorney General Holder on those issues when he was before the Committee earlier this month. I am very concerned that U.S. taxpayer dollars are being funneled to contractors who have repeatedly been shown to have been irresponsible or, even worse, have been convicted of serious criminal acts. GAO needs to take a comprehensive look at how Federal agencies are investigating and, when appropriate, suspending and debarring contractors that we know cannot be trusted.

The Department of Defense often gets criticized for this issue, but it is not just them. As we have mentioned, we are going to be pouring more and more money into the pockets of private contractors who protect State Department personnel in Iraq, and we need to know that those dollars are not going to contractors who pay bribes to foreign officials or perpetrate other frauds on the U.S. Government.

I will add our request to the GAO to the hearing record.

[The information referred to appears as a submission for the record.]

Senator FRANKEN. We will keep the record open for the next week for any additional questions or statements by other Senators.

Thank you again for your time today. This meeting stands adjourned.

Mr. BREUER. Thank you, Mr. Chairman.

Senator FRANKEN. Thank you.

[Whereupon, at 11:36 a.m., the Committee was adjourned.]

[Additional material submitted for the record follows.]

APPENDIX

ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

Witness List

Hearing before the
Senate Committee on the Judiciary

On

"Holding Criminals Accountable: Extending Criminal Jurisdiction to Government Contractors and Employees Abroad"

Wednesday, May 25, 2011
Dirksen Senate Office Building, Room 226
10:00 a.m.

Panel I

Tara Lee
Partner and Global Co-Chair of Transnational Litigation
DLA Piper LLP (US)
Washington, DC

Geoffrey Corn
Associate Professor of Law
South Texas College of Law
Houston, TX

Michael Edney
Of Counsel
Gibson, Dunn & Crutcher
Washington, DC

Panel II

The Honorable Lanny A. Breuer
Assistant Attorney General
Criminal Division
U.S. Department of Justice
Washington, DC

PREPARED STATEMENT OF HON. LANNY A. BREUER

Department of Justice

STATEMENT OF

LANNY A. BREUER
ASSISTANT ATTORNEY GENERAL
CRIMINAL DIVISION
DEPARTMENT OF JUSTICE

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

FOR A HEARING ENTITLED

"HOLDING CRIMINALS ACCOUNTABLE:
EXTENDING CRIMINAL JURISDICTION FOR GOVERNMENT
CONTRACTORS AND EMPLOYEES ABROAD"

PRESENTED

MAY 25, 2011

Statement for the Record of
Lanny A. Breuer
Assistant Attorney General
Criminal Division
Department of Justice

For a Hearing Entitled
"Holding Criminals Accountable: Extending Criminal Jurisdiction for Government Contractors and Employees Abroad"

Before the
Committee on the Judiciary
United States Senate

I. INTRODUCTION

Chairman Leahy, Ranking Member Grassley, and distinguished Members of the Committee: Thank you for inviting me to speak with you today about the proposed Civilian Extraterritorial Jurisdiction Act, or CEJA.

I am honored to appear before you on behalf of the Department of Justice, where I am privileged to lead the Criminal Division's nearly 600 lawyers in enforcing the Federal criminal laws. Together with the Nation's 94 U.S. Attorneys' Offices, the Criminal Division's Human Rights and Special Prosecutions Section investigates and prosecutes individuals under the existing Military Extraterritorial Jurisdiction Act, or MEJA, for crimes those individuals commit overseas. We have had great success in bringing cases under MEJA, and are committed to continuing to enforce MEJA vigorously.

As much as we have been able to accomplish under existing law, however, MEJA leaves significant gaps in our enforcement capability. In particular, under MEJA, certain civilian U.S. Government employees can commit crimes abroad, yet not be subject to the jurisdiction of U.S.

courts. For example, a civilian Government contractor whose employment is unrelated to the mission of the Department of Defense – but is related to the mission of another U.S. Government agency – cannot currently be prosecuted under MEJA, even if he or she clearly committed a crime. CEJA would address this significant shortcoming by extending U.S. jurisdiction to all non-Department of Defense employees and contractors who commit crimes overseas.

II. BACKGROUND

The Military Extraterritorial Jurisdiction Act, 18 U.S.C. § 3261, *et seq.*, is the principal Federal statute used to prosecute certain U.S. Government employees, contractors, and their dependents who commit crimes overseas. As originally enacted, in 2000, MEJA applied only to certain narrow classes of individuals associated with the Department of Defense. In 2004, however, Congress amended MEJA, expanding it to cover civilian employees and contractors (and their dependents) of agencies other than the Department of Defense, but only to the extent that the employee's or contractor's employment "relates to supporting the mission of the Department of Defense overseas."

Since MEJA was enacted, the Justice Department has successfully prosecuted numerous MEJA cases involving former Department of Defense employees or individuals accompanying them overseas. In *United States v. Steven Green*, for example, the Justice Department secured a conviction in Louisville, Kentucky against a former Army soldier for the brutal rape and killing of a 14-year old Iraqi girl and the murders of three of her family members while the soldier was on active duty in Iraq. In *United States v. Rico Williams*, the Justice Department obtained a conviction in the District of Columbia against a former Air Force senior airman for a gang-initiation beating that ended in the death of an Army Sergeant in Germany. And in *United States*

v. Dwain Williams, we obtained a jury conviction in Valdosta, Georgia against an individual accompanying a military service member overseas for the aggravated sexual abuse of a child in Japan.

The Justice Department has also successfully prosecuted Defense Department contractors employed overseas. In *United States v. Christopher Drotleff, et al.*, for example, we obtained jury convictions in Norfolk, Virginia of two Department of Defense contractors for involuntary manslaughter of a civilian in Afghanistan. In *United States v. Sean T. Brehm*, we secured a conviction from a Department of Defense contractor on charges of assault with a deadly weapon in Afghanistan. And in *United States v. Jorge Thornton*, we secured a conviction from a Department of Defense contractor for abusive sexual contact while working at a U.S. military Forward Operating Base in Iraq. We have also investigated and prosecuted non-Department of Defense contractors whose work related to "supporting the mission of the Department of Defense overseas."

The Justice Department also successfully and aggressively uses every other tool now available to us to prosecute crimes committed abroad by U.S. Government personnel and U.S. Government contractors (which can include both U.S. citizens and citizens of other countries). We can and do prosecute crimes committed within the special maritime and territorial jurisdiction (SMTJ) of the United States. In *United States v. Andrew Warren*, for example, a former official with the Central Intelligence Agency (CIA) was sentenced in the District of Columbia to 65 months in prison for abusive sexual contact committed while on U.S. Embassy property in Algiers, Algeria. We also bring many prosecutions for crimes committed in violation of Federal criminal statutes with clear extraterritorial application, such as procurement fraud.

Where we can hold U.S. Government personnel and contractors accountable for crimes committed while they are working on behalf of the U.S. Government, we will do so.

II. LEGISLATIVE NEED

These successes notwithstanding, there are significant limits to our ability to prosecute sometimes egregious criminal conduct committed overseas by people working on behalf of the U.S. Government. The criminal statutes with clear extraterritorial jurisdiction make up only a subset of the Federal criminal laws, and the special maritime and territorial jurisdiction of the United States is limited. Additionally, we can only charge a violation of MEJA when we can prove that the defendant's employment "relates to supporting the mission of the Department of Defense overseas." Whether any particular defendant falls within the scope of MEJA, therefore, depends upon highly specific facts and circumstances relating to his or her employment and, in practice, this statutory language has proven difficult to apply. Cases that would otherwise be straightforward can turn into complex investigations focusing not just on the underlying criminal conduct, but also on the scope of the defendant's employment, his or her specific work duties, and other jurisdiction-related facts. These inquiries about the scope of a particular defendant's employment can be extremely challenging and resource-intensive given that they often need to be conducted in war zones or under other difficult circumstances.

Furthermore, in some instances, the relevant information concerning a defendant's employment and how it relates to the Defense Department's mission may be classified. Although the Justice Department may use procedures set out under the Classified Information Procedures Act, such procedures may not be adequate to protect national security information and also establish to a jury beyond a reasonable doubt that a defendant is subject to MEJA. In

practice, this means that certain civilian U.S. Government employees and contractors can commit serious crimes overseas without fear of U.S. prosecution.

The unfortunate consequence of the current state of the law is that, for example, a Department of Defense contractor who murders a colleague in Iraq may be prosecuted under MEJA, while a contractor with another U.S. agency who commits the very same crime may not be, since he or she may not be covered by MEJA. Similarly, an employee with a non-Department of Defense agency who rapes a foreign national in the employee's diplomatic residence may be prosecuted for committing a crime within the special maritime and territorial jurisdiction of the United States, while the same person might not be able to be prosecuted if he commits the same crime in the victim's apartment.

CEJA is needed to close these gaps in the law. In the first hypothetical situation I just described, under CEJA, the Government contractor could be prosecuted for murder regardless of whether his or her employment had anything to do with the Department of Defense's mission. And in the second hypothetical situation I described, the U.S. Government employee could be prosecuted for rape regardless of where the crime occurred, and without the need for an inquiry into the precise nature of the defendant's employment.

Given the evolving nature of our engagement in various countries such as Iraq and Afghanistan, and given the large number of employees and contractors being utilized by agencies other than the Department of Defense, we view the enactment of CEJA as crucial to ensuring accountability and demonstrating to other countries that we do not give U.S. Government employees license to commit crimes overseas.

III. PROPOSED LEGISLATION

Mr. Chairman, we are pleased that you plan to introduce new legislation to close the gaps in the law. We look forward to working with your staff to make the legislation as strong as possible. In particular, to minimize potential sovereignty concerns of other countries, we hope that the legislation will preserve the authority of the relevant Chiefs of Mission and clarify that any law enforcement activities overseas related to CEJA will be conducted consistent with appropriate guidance from the Justice Department in consultation with the Department of State. It is essential that any legislation include a statutory carve-out to ensure that the legislation does not impose criminal liability on authorized intelligence activities of the United States Government. The absence of an explicit exemption for authorized intelligence activities conducted abroad would negatively impact the United States' ability to conduct such activities.

We share your goal of passing a robust and comprehensive CEJA statute that provides clear and unambiguous jurisdiction to prosecute non-Department of Defense personnel for overseas misconduct, without wasting valuable resources on unnecessary litigation and urge you to draft it in a way that focuses on the most serious, violent crimes committed abroad.

IV. CONCLUSION

Since MEJA's passage in 2000, we have aggressively enforced MEJA against Department of Defense employees, contractors, and individuals accompanying them. We have also investigated a number of matters involving non-Department of Defense persons when we can establish that their employment "relates to supporting the mission of the Department of Defense overseas" or where we had extra-territorial jurisdiction under other statutes. However, under the current law, certain U.S. Government employees can commit crimes overseas without

being prosecuted. The United States may not have jurisdiction and the host nation may not have the capability or willingness to prosecute. CEJA would fix this significant problem by extending U.S. jurisdiction to all non-Department of Defense employees who commit specified crimes overseas. We fully support this legislative goal, and look forward to working with the Committee as it further refines the bill.

Thank you for the opportunity to appear before you today. I would be pleased to take any questions you may have.

PREPARED STATEMENT OF PROF. GEOFFREY S. CORN

Statement by Geoffrey S. Corn

Professor of Law, South Texas College of Law, Houston, Texas; Lieutenant Colonel, U.S. Army (Retired)

I would first like to thank the Committee for providing me the opportunity to share my perspective on the importance of enacting the Civilian Extraterritorial Jurisdiction Act (CEJA).

As a soldier and military staff officer I was taught to express my "bottom-line up front," and my bottom-line is that Congress should enact this statute. Indeed, I believe the expansion of federal civilian jurisdiction over contractors associated with the U.S. government is not only consistent with the national security interests of the nation, but is also clearly in the best interest of the U.S. armed forces. From a national security perspective, CEJA will contribute to the deterrence of contractor misconduct by placing contractors on clear notice that such misconduct is subject to federal criminal sanction, and will reduce the risk that the credibility of U.S. operations will be compromised by a perception of impunity for contractor misconduct. From a military perspective, CEJA will reduce the possibility that the military will be called upon to assert jurisdiction over contractors because of a lack of viable alternatives to address contractor misconduct.

Civilians – both civil servants and contractors – are unquestionably essential to executing the broad range of missions related to achieving the national security objective of the nation. While it is not a new phenomenon to rely on civilians to support external efforts to achieve these objectives, the numbers of civilians and range of missions performed is unprecedented in our history. Indeed, the changing nature of the strategic framework associated with executing our national security strategy will continue to push civilians into a range of functions not seen previously. In the era of conventional military threats, we rightly anticipated that employment of civilians abroad would be predominately associated with the armed forces. Unlike prior eras, the increasing imperative of inter-agency participation in the execution of national security strategy has resulted in robust presence of civilians operating in support of both the Department of Defense and other federal agencies.

This trend, coupled with the post-cold war emphasis on increasing the "tooth to tail" ratio of military deployments, has produced the inevitable reality of civilian misconduct in relation to these missions. Prior to 1970, trial by courts-martial served as the primary mechanism for responding to such misconduct. This was the result of two influences. First, civilians supporting U.S. national security objectives normally operated in association with the armed forces. Second, the exercise of military jurisdiction over such civilians was considered consistent with both the tradition of military law and the Constitution. This latter influence was fundamentally undermined when the Court of Military Appeals (the predecessor to the Court of Appeals for the Armed Forces) decided the case of *United States v. Averette* (19 C.M.A. 363, 41 C.M.R. 363

(1970)). That decision held that the jurisdiction over civilians accompanying the armed forces established by Congress in the Uniform Code of Military Justice (UCMJ) applied only during periods of formally declared war. As a result of this opinion (and the assumption that a formally declared war was a highly unlikely event), an entire generation of Judge Advocates learned that it was almost inconceivable that civilians would ever again be subject to military jurisdiction.

The impunity for civilian misconduct created by this jurisdictional void became apparent as the U.S. military focused increasingly on expeditionary operations in the decade following the end of the Cold War. In response, Congress sought to fill the void by enacting the Military Extraterritorial Jurisdiction Act (MEJA). This law reflected a clear preference for Article III civilian trial for civilians who commit misconduct when operating in association with the armed forces outside the United States, a preference perceived as logical by the military. However, a perception of contractor impunity arose during the decade following MEJA's enactment as the result of jurisdictional and implementation limitations of the statute, with certain high profile cases of civilian contractor misconduct in Iraq and Afghanistan drawing particular attention. In an apparent response to this perception, in 2006 Congress amended the UCMJ to resurrect military jurisdiction over civilians accompanying the armed forces in the field. By explicitly including contingency operations within the scope of that jurisdiction, Congress overrode Averette's "formally declared war" limitation.

This resurrection took military legal experts by surprise. Having come of age in the post Averette era, many of these experts assumed that the Constitution barred asserting military jurisdiction over civilians beyond the limited context of war crimes. This assumption was informed by both Averette and *Reid v. Covert* (354 U.S. 1 (1957)) – a seminal Supreme Court decision related to the application of Bill of Rights protections to U.S. citizens outside the United States. Ried's core holding was that trying spouses of U.S. service-members stationed abroad by courts-martial (even when authorized by international agreement) for capital offenses deprived these citizens of the protections of the Fifth and Sixth Amendment. However, Ried struck down the assertion of military jurisdiction over U.S. civilians only in locations with a mature presence of U.S. forces (like the United Kingdom, Japan, Germany, and other NATO allied nations); it did not address the assertion of such jurisdiction over civilians accompanying the armed forces in the field. In fact, the Court specifically excluded such jurisdiction from its decision.

While Averette relied heavily on Reid, it is clear that the resurrection of military jurisdiction over civilians accompanying the armed forces during contingency operations was not clearly unconstitutional. Nonetheless, as I have written in the attached law review article, this resurrection does raise significant constitutional questions. If the exercise of military jurisdiction over civilians is understood as a measure of last resort – as I believe it must be based on our historic aversion to the intrusion of military authority into the realm of civil affairs – then the enactment of federal criminal statutes like MEJA and the War Crimes Act (and the overall increases in long-arm federal criminal jurisdiction) represents a fundamental change in circumstances from the pre-Averette era. Prior to this evolution of federal criminal law, military

jurisdiction provided near exclusive criminal jurisdiction over civilians accompanying the armed forces in the field. It is therefore unsurprising that since the inception of the nation, military courts have been vested with such jurisdiction. Today, however, this is no longer the case. As a result, the imprimatur of necessity no longer provides a compelling justification for subjecting civilians to military criminal jurisdiction.

This is not to suggest that I consider courts-martial somehow defective. Indeed, it is my belief that trial by court-martial is fundamentally fair, and in many respects more protective of an accused's right to a fair trial than Article III trials. However, courts-martial process simply does not afford the full panoply of rights to a criminal defendant provided by the Constitution. Most notably, trial by courts-martial does not require Grand Jury indictment, life tenured judges, or a jury composed of the defendant's peers. While these differences have historically been considered acceptable for members of the armed forces subject to the special criminal justice system of the military, it is difficult to justify subjecting civilians to criminal trials absent these protections unless doing so is a genuine measure of last resort. In my opinion, most civilians would simply not understand why a civilian would be tried in such a unique criminal system, being judged not by a jury of his or her peers but instead by a panel of military officers.

It is because of this I believe it was critically important to enact MEJA. However, MEJA was based on an assumption that has become increasingly stale: that civilians present in areas of military operations will be connected to the military by employment or contract. Civilians supporting the complex missions of today, although often operating in close proximity with the military, are routinely connected to other government agencies. The employment or contractual relationship between these civilians and the U.S. government places them outside the scope of MEJA jurisdiction, producing the same type of jurisdictional gap MEJA sought to close. CEJA is therefore a necessary complement to MEJA. Its enactment will ensure all civilians present in operational areas as the result of an employment or contractual relationship with the United States (other than host nation nationals) are subject to federal civilian criminal jurisdiction. As a result, it will reduce the likelihood that the military will be called upon to exercise criminal jurisdiction over incidents of misconduct committed by these civilians, thereby averting the complex policy and constitutional issues resulting trying civilians by courts-martial.

I also support the enumeration of offenses in CEJA. While MEJA employs the alternate method of incorporating Title 18 offenses, I believe the enumeration approach provides two important benefits. First, it provides clear notice of the scope of criminal proscription imposed on civilians subject to CEJA. Second, it limits the type of offenses that might result in a CEJA prosecution to serious crimes. This latter benefit also reveals another concern with subjecting civilians to UCMJ jurisdiction. When Congress amended the UCMJ to resurrect military jurisdiction over civilians accompanying the force, it in no way limited the offenses applicable to civilians. As a result, that amendment subjects civilians to every offense in the military code – a range of offenses that extends beyond serious common law crimes and includes unique military offenses. While I believe it is unlikely that a military commander would pursue charges against a civilian

for unique military offenses (such as disobedience of orders, absence without official leave, or dereliction of duty), CEJA would substantially reduce even the risk of such an odd assertion of military jurisdiction.

There are other situations where CEJA, like MEJA, could prove quite beneficial, most notably for addressing acts of misconduct by civilian employees and family members serving abroad in more stable environments. Military experience over the decades indicates that there are times when these civilians engage in misconduct that the host nation is either not interested in, or does not have valid jurisdiction to address. CEJA would provide a means for prosecuting acts of serious misconduct committed by civilians associated with U.S. government agencies in other countries. In fact, the ability to exercise such jurisdiction might result in the host nation foregoing prosecution at the request of the U.S. government even when they initially pursue such cases, allowing the U.S. civilian to be prosecuted in the United States instead of a foreign jurisdiction.

Ultimately, I can see no good reason not to enact CEJA. While I don't think it is possible to guarantee that resort to military jurisdiction for civilian misconduct will never be necessary and appropriate, I believe enhancing the scope of federal civilian jurisdiction over civilians abroad is an important means of limiting such resort to situations of genuine necessity. MEJA was the first step in achieving that goal; CEJA will be the next. The ever increasing reliance on civilian support to U.S. government functions abroad necessitates an ability to ensure accountability for the small minority of civilians who engage in misconduct. Unless federal civilian criminal jurisdiction is comprehensive, pressure to resort to the broad grant of military jurisdiction over civilians resurrected by the 2006 amendment to the UCMJ is almost inevitable. It is therefore in the interests of the nation, the military, and potential civilian defendants to enact CEJA.

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Bringing Discipline to the Civilianization of the Battlefield: A Proposal for a More Legitimate Approach to Resurrecting Military Criminal Jurisdiction over Civilian Augmentees**

GEOFFREY S. CORN*

I. INTRODUCTION

In October 2006 the National Defense Authorization Act of 2007 became law.[1] Included within the thousands of statutory provisions of this Act was an amendment to the Uniform Code of Military Justice ("UCMJ").[2] Unexpected by even the Department of Defense, this amendment radically altered what is best described as the de facto immunity from military criminal jurisdiction that civilians accompanying the armed forces in operational areas enjoy. Pursuant to *United States v. Averette*,[3] a 1970 U.S. Court of Military Appeals case, these civilians—a group that includes both civil servants and contractors—were beyond the reach of military jurisdiction in all wars not formally declared by Congress.[4] This decision produced what can almost be described as an article of faith within the military legal community that civilians would never again be subject to military criminal jurisdiction.[5]

** The term "civilian augmentee" is not a doctrinal term within the U.S. Department of Defense. It will, however, be used throughout this article to refer to civilians who work for the armed forces to augment military capabilities in areas of active military operations. These civilians are designated "civilians accompanying the force in the field " in both the Uniform Code of Military Justice and in most doctrinal sources.

* Assistant Professor of Law, South Texas College of Law, Houston, Texas. Before joining the faculty, Professor Corn served as the Special Assistant for Law of War Matters to the U.S. Army Judge Advocate General, the Army's senior law of war adviser and representative to the Department of Defense Law of War Working Group. Prior to serving in the position, Professor Corn spent twenty-one years on active duty in the Army, retiring in the rank of Lieutenant Colonel in the Judge Advocate General's Corps.

1. John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, 120 Stat. 2083 (2006).

2. *Id.* § 552, 120 Stat. at 2217 (to be codified at 10 U.S.C. § 802) ("Paragraph (10) of section 802(a) of title 10, United States Code (article 2(a) of the Uniform Code of Military Justice), is amended by striking 'war' and inserting 'declared war or a contingency operation'.").

3. 19 C.M.A. 363 (1970).

4. *Id.* at 365.

5. *See* Joseph R. Perlak, *The Military Extraterritorial Jurisdiction Act of 2000: Implications for Contractor Personnel*, 169 MIL. L. REV. 92, 97–98 (2001); *see also* U.S. ARMY JUDGE ADVOCATE GENERAL'S LEGAL CENTER AND SCHOOL, OPERATIONAL LAW HANDBOOK 129–48 (John Rawcliffe & Jeannine Smith eds., 2006) [hereinafter OPERATIONAL LAW HANDBOOK]. Although the Operational Law Handbook is not a source of official Army or Department of

This immunity, coupled with the exponential increase in the civilianization of the modern "battle space," led military commanders, lawmakers and nongovernmental organizations to become increasingly frustrated with the lack of disciplinary sanctions responsive to civilian misconduct.[6]

This concern was not a post–September 11 phenomenon. In fact, the civilianization trend began in earnest following the end of the Cold War in response to the reduction of the armed forces.[7] During the 1990s, Congress responded to this trend by passing the War Crimes Act

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Defense doctrine, it is regarded throughout the military legal community (and other government agencies) as a concise and pragmatically oriented summary of other binding sources of authority concerning military operations.

6. According to one recent article:

> It is estimated there are as many as 100,000 civilian support personnel working in Iraq, including highly trained former special forces soldiers, drivers, cooks, mechanics, plumbers, translators, electricians and laundry workers.
>
> A trend toward "privatizing war" has been accelerating steadily since the end of the Cold War. The U.S. armed forces has shrunk from 2.1 million when the Berlin Wall came down in 1989 to 1.4 million today.
>
> "At its present size, the U.S. military could not function without civilian contractors,"said Jeffrey Addicott, an expert at St. Mary's University in San Antonio. "The problem is that the civilians operate in a legal gray zone. There has been little effort at regulation, oversight, standardized training and a uniform code of conduct."

Bernd Debusmann, *War Is Also Taking a Toll on Contractors: At Least 647 Support Personnel Killed*, SAN DIEGO UNION-TRIB., Oct. 12, 2006; *see also* Michael N. Schmitt, *War, International Law, and Sovereignty: Reevaluating the Rules of the Game in a New Century: Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees*, 5 CHI. J. INT'L L. 511 (2005). As Professor Schmitt notes:

> What accounts for the explosion of contractor personnel and civilian government employees on or near the battlefield? Cost is one factor. In the aftermath of the Cold War, most governments sought to realize the "peace dividend" by drawing down legacy armies sized and equipped to fight a global conflict. But the dividend never materialized; on the contrary, many states found their security environment complicated by the demise of (stabilizing) bipolarity and the emergence of new threats like transnational terrorism and internal unrest. Yet, for domestic political reasons, downsizing was a process that usually proved irreversible.
>
> In light of this dilemma, the use of civilians in support roles proved especially appealing because it freed up military personnel to perform combat missions. In this way, armed forces avoided a straight-line relationship between reduced numbers and reduced combat effectiveness. In the US, the consequent civilianization was labeled "Transformation."

Id. at 517 (citations omitted). As of October 12, 2006, more than 600 civilian-support personnel have been killed while performing duties associated with the armed conflict in Iraq. *See* Debusmann, *supra*.

7. *See* Schmitt, *supra* note 6, at 517.

of 1996[8] and the Military Extraterritorial Jurisdiction Act of 2000,[9] both of which subjected civilians accompanying the armed forces to federal criminal jurisdiction for certain felony offenses. Unfortunately—or perhaps fortunately depending on perspective—the executive branch did not efficiently implement these statutes, and they were rarely used to respond to civilian-augmentee misconduct.[10] Nonetheless, these statutes provided the exclusive criminal and disciplinary remedy available to military commanders to respond to such misconduct.[11] Neither the impact on the good order and discipline of the military unit with which the civilian was associated, nor the perception of "discipline inequity" resulting from disparate treatment of civilian and military personnel working in close proximity, justified any alternate remedy.[12]

In what must have been a response to these statutes' ineffective use and to the increasing concern over civilian misconduct associated with the global War on Terror,[13] Congress did what many military legal experts thought unthinkable: amended the UCMJ to resurrect military jurisdiction over civilians during all "contingency" operation.[14] With one paragraph of a massive statute, Congress effectively subjected the tens of thousands of U.S. civilians working for the armed forces—a group referred to throughout this article as "civilian augmentees"—to

8. *See* Pub. L. No. 104-192, 110 Stat. 2104 (codified as amended in scattered sections of 18 U.S.C.).

9. *See* Pub. L. No. 106-523, 114 Stat. 2488 (codified as amended in 18 U.S.C. §§ 3001, 3261–3267).

10. *See* Wm. C. Peters, *On Law, Wars, and Mercenaries: The Case for Courts-Martial Jurisdiction over Civilian Contractor Misconduct in Iraq*, 2006 BYU L. REV. 367, 373, 414 (2006); *see also* Perlak, *supra* note 5, at 104.

11. *See* OPERATIONAL LAW HANDBOOK, *supra* note 5, at 136–37. Although civilians accompanying the force were placed under the jurisdiction of the UCMJ by operation of Article 2 of the Code, application of this jurisdiction was restricted to periods of formally declared war as the result of the Court of Military Appeals decision in *United States v. Averette*, 19 C.M.A. 363 (1970). *See infra* notes 97–105 and accompanying text.

12. *See generally* Thomas G. Becker, *Justice on the Far Side of the World: The Continuing Problem of Misconduct by Civilians Accompanying the Armed Forces in Foreign Countries*, 18 HASTINGS INT'L & COMP. L. REV. 277 (1995).

13. This term will be used throughout this article as a convenient reference for the variety of military operations conducted by the United States after September 11, 2001. Use of this term is not intended as a reflection on this author's position on the legitimacy of characterizing these operations as a "war." While the author acknowledges the hyperbolic nature of this term, it is intended to refer to combat military operations against armed and organized opposition groups.

14. *See* 10 U.S.C.A. § 101(a)(13) (West 2007) ("The term 'contingency operation' means a military operation that—(a) is designated by the Secretary of Defense as an operation in which members of the armed forces are or may become involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing military force; or (b) results in the call or order to, or retention on, active duty of members of the uniformed services under section 688, 12301(a), 12302, 12304, 12305, or 12406 of this title, chapter 15 of this title, or any other provision of law during a war or during a national emergency declared by the President or Congress."); *see also* OPERATIONAL LAW HANDBOOK, *supra* note 5, at 129–30.

the full corpus of the UCMJ during any operation authorized by the Secretary of Defense.[15] Although ostensibly motivated by a legitimate desire to improve the disciplinary arsenal available for military commanders to address misconduct by civilians associated with their units, the scope of jurisdiction this amendment established raises troubling constitutional and pragmatic concerns.

The most obvious of these concerns is the trial by a military court of a U.S. citizen who is *not* a member of the armed forces. Imagine that inside a former Saddam palace in Iraq sits a military courtroom. There is a prosecutor and defense counsel, both junior JAG officers; a more senior JAG officer presiding as a military judge; an enlisted soldier serving as a court reporter; a chair for witnesses; and a jury box in which approximately seven military personnel of various rank and experience sit. Consistent with the tradition of bringing military justice to the battlefield,[16] such courts are convened routinely in places like Iraq and Afghanistan and there is nothing particularly remarkable about this scene. But now imagine that the individual sitting next to the military defense counsel is not another member of the armed forces, but a U.S. civilian—perhaps someone who signed up at a Kellog-Brown and Root job fair in Houston to drive a truck in Iraq.

What was unremarkable suddenly becomes remarkable. A U.S. citizen who is not a member of the armed forces faces a federal felony conviction in a non-Article III court. A judge who does not enjoy life tenure presides. And the U.S. citizen is without the benefit of indictment by grand jury. In addition, this citizen's fate is to be decided by a panel of military personnel—anything but a jury of his peers.

In a seminal decision addressing the reach of the Bill of Rights, the Supreme Court in 1957 struck down a provision of the UCMJ that established military jurisdiction over civilian dependents residing on U.S. military bases overseas.[17] The Court held that it was unconstitutional to subject these civilians to trial by courts-martial because military courts deprived citizens of fundamental constitutional rights.[18] The Court was careful to indicate, however, that it was not necessarily addressing the

15. *See* John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, § 552, 120 Stat. 2083, 2217 (2006) (to be codified at 10 U.S.C. § 802(a)(10)) ("Paragraph (10) of section 802(a) of title 10, United States Code (article 2(a) of the Uniform Code of Military Justice), is amended by striking 'war' and inserting 'declared war or a contingency operation'.").

16. *See* OPERATIONAL LAW HANDBOOK, *supra* note 5, at 193–204 (describing criminal law in operations).

17. Reid v. Covert, 354 U.S. 1, 5 (1957).

18. *Id.* at 9–10 ("[I]n view of our heritage and the history of the adoption of the Constitution and the Bill of Rights, it seems particularly anomalous to say that trial before a civilian judge and by an independent jury picked from the common citizenry is not a fundamental right.").

constitutionality of such a forum in the very different context of a theater of military operations.[19] This qualification was significant because Congress had established two distinct sources of military jurisdiction over civilians through the UCMJ.[20] The jurisdiction struck down by the Court in *Reid* extended to any civilian who was associated with the armed forces overseas, so long as there was a treaty or other agreement granting jurisdiction to the armed forces by the host nation.[21] This source of jurisdiction was not limited to the exigency of active military operations. Thus, it reached any spouse or employee of the armed forces stationed abroad. In a different provision of the UCMJ—the one recently amended—Congress also established military jurisdiction over civilians accompanying the armed forces in the field during "time of declared war."[22] In *Reid*, the Court indicated that it was not ruling on this distinct source of jurisdiction.[23]

This other basis of jurisdiction survived the *Reid* decision. Thus, although the prospect of a civilian being tried by a military court may seem remarkable today, it was the norm until 1970. From the inception of the Republic, civilians accompanying the armed forces during wartime have been subject to military-criminal jurisdiction,[24] which had been provided for in predecessors to the UCMJ[25] and which is currently incorporated in the UCMJ today.[26] In 1970, however, the Court of Military Appeals effectively eliminated this source of jurisdiction when it held that the phrase "in time of war" meant "a war formally declared by Congress."[27]

For the next thirty-four years, military-legal experts assumed that

19. *Id.* at 33 ("There have been a number of decisions in the lower federal courts which have upheld military trial of civilians performing services for the armed forces 'in the field' *during time of war*. To the extent that these cases can be justified, insofar as they involved trial of persons who were not 'members' of the armed forces, they must rest on the Government's 'war powers.' In the face of an active hostile enemy, military commanders necessarily have broad power over persons in the battlefront. From a time prior to the adoption of the Constitution the extraordinary circumstances present in an area of actual fighting have been considered sufficient to permit punishment of some civilians in that area by military courts under military rules.").

20. *See* 10 U.S.C. § 802(a)(10)–(11) (2000).

21. *See Reid*, 354 U.S. at 3 (discussing what is now 10 U.S.C. § 802(a)(11)).

22. *See* 10 U.S.C. § 802(a)(10).

23. *See Reid*, 354 U.S. at 33 ("From a time prior to the adoption of the Constitution the extraordinary circumstances present in an area of actual fighting have been considered sufficient to permit punishment of some civilians in that area by military courts under military rules.").

24. *See id.*

25. When passed by Congress, the UCMJ had the intended purpose of "unifying, consolidating, revising, and codifying the Articles of War, the Articles for the Government of the Navy, and the disciplinary laws of the Coast Guard." Pub. L. No. 81-506, 64 Stat. 107, 108 (1950) (current version at 10 U.S.C. §§ 801–946 (2000)).

26. *See* 10 U.S.C. § 802(a)(10)–(11).

27. United States v. Averette, 19 C.M.A. 363, 365 (1970).

civilians accompanying the armed forces, even during combat operations, were beyond the scope of military criminal jurisdiction. Even as the number of such civilians expanded exponentially following the end of the Cold War,[28] with an accordant concern over how to hold them accountable for serious misconduct in locations where turning them over to host-nation jurisdiction was an unrealistic option, this assumption remained intact.[29] Then, like a bolt out of the blue in October 2006, the UCMJ was amended to resurrect military criminal jurisdiction over these civilian augmentees.[30]

This resurrection took the form of a one-paragraph provision in the National Defense Authorization Act of 2007, which reads as follows:

> SEC. 552. CLARIFICATION OF APPLICATION OF UNIFORM CODE OF MILITARY JUSTICE DURING A TIME OF WAR.
>
> Paragraph (10) of section 802(a) of title 10, United States Code (article 2(a) of the Uniform Code of Military Justice), is amended by striking ''war'' and inserting ''declared war or a contingency operation''.[31]

Purportedly inserted by Senator Graham of South Carolina,[32] the amendment has the effect of subjecting any civilian—civil servant or contractor—"accompanying" the armed forces in a deployed location to the jurisdiction of the entire UCMJ, including the jurisdiction of military courts.[33] Because there is no legislative history for this amendment or any other background information that might have existed had it been enacted at the request of the Department of Defense, it is unclear how far this "accompanying" theory might reach. Experts would likely assert that the term refers to civilians connected to the military through some kind of employment relationship.[34] But military jurisprudence from an earlier era suggests that the net may have been thrown much farther, able to reach other civilians only peripherally associated with the military,[35] such as journalists and former employees who remain in the

28. *See* Schmitt, *supra* note 6, at 517.

29. *See* OPERATIONAL LAW HANDBOOK, *supra* note 5, at 136 ("Contractor employees are not subject to military law under the UCMJ when accompanying U.S. forces, except during a declared war.").

30. *See* John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, § 552, 120 Stat. 2083, 2217 (2006) (to be codified at 10 U.S.C. § 802).

31. *Id.* (bold omitted).

32. John M. Broder & James Risen, *Armed Guards in Iraq Occupy a Legal Limbo*, N.Y. TIMES, Sept. 19, 2007, at A1.

33. The amended version of § 802 establishes who is subject to the Code. Accordingly, any person falling into one of the personam-jurisdiction categories of Article 2 is subject to the entire UCMJ, including all the punitive prohibitions established by the Code and the plenary jurisdiction of all military courts. *See* 10 U.S.C.A. § 802(a) (West 2007).

34. *See* Peters, *supra* note 10, at 401–03.

35. *See* David A. Melson, *Military Jurisdiction over Civilian Contractors: A Historical*

deployed area. Nor is the jurisdiction limited to the type of common-law offenses normally applicable to civilians. Instead, it subjects these civilians to every punitive article in the UCMJ, including offenses unique to the military such as disrespect toward superiors,[36] disobedience of orders,[37] absence without official leave,[38] and desertion.[39]

This amendment raises a troubling and difficult question: Does the decision of a U.S. civilian to accept employment supporting the armed forces in an area of active military operations justify the deprivation of some of the most fundamental constitutional rights of a criminal defendant? The history of military jurisdiction over civilians in active theaters of operations and the qualified holding of *Reid* both suggest an affirmative answer to this question.[40] But is there sufficient justification today to warrant resurrecting plenary military jurisdiction over these civilians? Assuming that the need to provide some meaningful remedy for serious criminal misconduct provides justification, it is essential to consider how Congress, working with the Department of Defense, changed the jurisdictional landscape during that thirty-four-year period of dormancy for military jurisdiction over civilians. When these changes are considered along with the scope of criminal proscription, and civilians are subjected to this amendment and the long-term stigmatization resulting from a conviction by a military court of general jurisdiction,[41] the justification seems far less compelling than it did in previous eras.

Nonetheless, it would be disingenuous to suggest that there is no

Overview, 52 NAVAL L. REV. 277, 290–92 (2005). The problematic nature of this provision and the associated uncertainty as to the scope of jurisdiction has been recently highlighted by the controversy over alleged misconduct by "Blackwater" contractors in Iraq.

36. 10 U.S.C. § 889 (2000).

37. *Id.* § 891 (assaulting or willfully disobeying superior commissioned officer); *id.* § 892 (failure to obey order or regulation).

38. *Id.* § 886.

39. *Id.* § 885.

40. *See* Peters, *supra* note 10, at 369; *see also* Melson, *supra* note 35, at 282 ("[T]he set of laws governing civilians accompanying military forces is shaped by evolving concepts of constitutional rights, foreign policy concerns, and the military's interest in maintaining order.").

41. Under the UCMJ, three types of military courts are empowered to try individuals subject to the Code. The general court-martial is a court of plenary jurisdiction, empowered to try any person subject to the Code for any offense established by the Code, and to impose any punishment authorized by the Code. 10 U.S.C. § 816(1) (2000). A special court-martial is a court of more limited jurisdiction, empowered to try individuals other than commissioned officers, but limited in the authorized punishment it may adjudge (a maximum of one year confinement and a Bad Conduct punitive discharge). *See id.* §§ 816(2), 819. Conviction by either of these courts results in a federal felony record. A summary court-martial is the court of most limited jurisdiction. Like the special court-martial, it may not try commissioned officers. Authorized punishments are also limited, and do not include adjudging a punitive discharge (or any discharge from military service). *Id.* § 820. Most importantly for purposes of this article, a conviction by a summary court-martial *does not* result in a federal felony record. *See id.* § 820.

"disciplinary gap" related to civilian-augmentee misconduct, even when considering the change in federal criminal jurisdiction. The rate of civilianization over the past two decades has resulted in an explosion of civilians who support the armed forces in operational areas.[42] This has produced a disciplinary anomaly for military commanders. Although they are armed with a powerful arsenal of criminal and disciplinary remedies for misconduct committed by members of the armed forces, there is virtually no remedy for civilians working side by side with these service members. Eliminating this anomaly was a probable motive behind the recent amendment to the UCMJ. But the most important question related to this amendment remains unanswered: Does the nature of the military interest justify the scope of the jurisdictional resurrection?

This article will propose a negative answer to that question. Although acknowledging the conceptual constitutionality of this amendment, it will show how the uncertain authority of *Reid*, when coupled with the changes in federal criminal law, calls into question the necessity for subjecting civilians to the full corpus of the UCMJ. In recognition of the genuine disciplinary concerns of military commanders in the contemporary operational area, however, the article will propose an alternative to the amendment. This alternative would subject civilian augmentees to the limited jurisdiction of summary courts-martial.[43] Such an amendment would empower the military commander to initiate quasi-judicial proceedings against civilians in a forum authorized to impose disciplinary-like sanctions. Unlike special[44] and general[45] courts-martial, however, a finding of guilt before a summary court would not result in a federal-criminal conviction. This alternate amendment would also remove from military jurisdiction the disposition of allegations of serious criminal misconduct not considered amenable to disciplinary-type sanctions. Instead, the disposition of these allegations would fall under the federal-criminal jurisdiction established by Congress in the 1990s.

Such a limited resurrection of military jurisdiction will provide commanders with a viable tool to impose disciplinary sanctions on civilians whose conduct jeopardizes the good order and discipline of the unit. And it will also protect the civilian from any criminal conviction absent protection of fundamental constitutional trial rights that the *Reid* Court considered so significant.[46] This alternative will accordingly strike a

42. *See* Chris Lombardi, *Law Curbs Contractors in Iraq*, A.B.A. J. EREP., May 14, 2004, http://scrivovivo.net/chris/my14iraq.html.

43. *See* 10 U.S.C. § 820.

44. *See id.* § 819.

45. *See id.* § 818.

46. *See Reid*, 354 U.S. at 8–9 ("This Court and other federal courts have held or asserted that

more equitable balance between the genuine needs of military commanders and the fundamental constitutional rights of civilians associated with their units.

A. *How the Jurisdictional Landscape for Civilian Augmentees Has Changed*

Because the *Averette* decision effectively nullified military jurisdiction over civilian augmentees,[47] some scholars have suggested the need to amend the "time of war" language of the UCMJ to restore this jurisdiction.[48] The de facto nullification of such jurisdiction damaged the effectiveness of U.S military operations during the post-Cold War period.[49] During this period, the increased frequency of U.S. military operations combined with downsizing of the uniformed force produced an ever-growing population of civilian augmentees in operational areas.[50] Because of the "time of war" holding of *Averette*, these civilians were effectively immune from U.S. criminal jurisdiction.[51] Exacerbating this de facto immunity was the reality that when these civilians committed serious criminal misconduct, it often occurred in places where turning them over to host-nation authorities for prosecution was never a feasible option—places like Bosnia, Kosovo, Somalia, Haiti, and theaters of actual-combat operations like Afghanistan and Iraq.

Well before the recent amendment to the UCMJ, Congress sought to fill this jurisdictional vacuum with two significant but clearly underused federal statutes—the War Crimes Act of 1996 ("WCA")[52] and the Military Extraterritorial Jurisdiction Act of 2000 ("MEJA").[53] These statutes combined to provide a potentially effective source of criminal jurisdiction over civilian augmentees for the type of serious

various constitutional limitations apply to the Government when it acts outside the continental United States. While it has been suggested that only those constitutional rights which are 'fundamental' protect Americans abroad, we can find no warrant, in logic or otherwise, for picking and choosing among the remarkable collection of 'Thou shalt nots' which were explicitly fastened on all departments and agencies of the Federal Government by the Constitution and its Amendments.") (citations omitted).

47. *See* Peters, *supra* note 10, at 395.

48. *See, e.g., id., supra* note 10, at 373–74, 395.

49. *See generally* Perlak, *supra* note 5, at 93 ("For over forty-three years, civilians accompanying the force overseas have been beyond court-martial jurisdiction and a significant portion of the overall criminal jurisdiction of the United States.").

50. *See* Schmitt, *supra* note 6, at 517–18, 546.

51. *See* Peters, *supra* note 10, at 399–405.

52. Pub. L. No. 104-192, 110 Stat. 2104 (codified as amended in scattered sections of 18 U.S.C.).

53. Pub L. No. 106-523, 114 Stat. 2488 (codified as amended in 18 U.S.C. §§ 3001, 3261–3267); *see also* Glenn R. Schmitt, *Closing the Gap in Criminal Jurisdiction over Civilians Accompanying the Armed Forces Abroad—A First Person Account of the Creation of the Military Extraterritorial Jurisdiction Act of 2000*, 51 CATH. U. L. REV. 55 (2001).

common-law offenses that their military counterparts would undoubtedly be prosecuted for committing.[54] By effectively filling the jurisdictional vacuum, Congress altered the jurisdictional landscape related to the necessity of subjecting civilians to military criminal jurisdiction. This article contends that within this context, the resurrection of plenary military jurisdiction is an unnecessary return to an outdated jurisdictional concept. Further, the scope of jurisdiction resurrected by the recent amendment to the UCMJ is, independent of the existing federal criminal jurisdiction established by the MEJA and the WCA, unnecessarily overbroad to provide criminal sanctions for civilian-augmentee misconduct. A more carefully crafted balance between military interests and those of civilian augmentees is both necessary and justified. The amendment to the UCMJ provides a seed for developing a solution for the issue of civilian-augmentee misconduct that strikes such a solution. As will be asserted in this article, however, limiting the extent of the resurrection of military jurisdiction is essential to achieve this objective.

II. THE NOT SO UNPRECEDENTED APPLICATION OF MILITARY JURISDICTION TO CIVILIAN AUGMENTEES.

For as long as the United States has fielded armed forces, civilian-support personnel have been associated with these forces in operational areas, and have been recognized as an essential component to military operations.[55] Often referred to as "sutlers" or "camp-followers," these civilians historically provided essential logistical support.[56] These civilians were also subject historically to military jurisdiction while they were associated with the armed forces.[57] This jurisdiction was based on the perceived necessity of empowering military commanders with authority to impose disciplinary and criminal sanctions on these civilians, an authority considered essential to the maintenance of good order and discipline in the military unit.[58]

54. In fact, MEJA was responsive to a congressional mandate contained in the 1996 National Defense Authorization Act requiring the Department of Defense and the Department of Justice to review and make recommendations to Congress before January 15, 1997 "concerning the appropriate forum for criminal jurisdiction over civilians accompanying the Armed Forces in the field outside the United States in time of armed conflict." National Defense Authorization Act for Fiscal Year 1996, Pub. L. 104-106, § 1151, 110 Stat. 186, 467 (codified as amended in 10 U.S.C. § 802 note).

55. *See* SAMUEL ELIOT MORISON, THE OXFORD HISTORY OF THE AMERICAN PEOPLE 367 (1965) (noting the crucial role played by civilians in aiding Lewis and Clark's expedition in 1804); *see also* Peters, *supra* note 10, at 376 ("Civilians have accompanied American military forces in the ranks, in the field, and at post, camp, and station since the War of Independence.").

56. *See* WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 98–99 (2d ed. 1920).

57. *Id.* at 98.

58. *See* Becker, *supra* note 12, at 280 ("As part of an extensive 1920 revision of the Articles

Jurisdiction over civilian augmentees was established by the Continental Congress as far back as the Revolutionary War, in a predecessor to the UCMJ.[59] Colonel William Winthrop described this jurisdiction in his seminal treatise on military law:

> "*All retainers to the camp, and all persons serving with the armies of the United States in the field, though not enlisted soldiers, are to be subject to orders, according to the rules and discipline of war.*" [Article 63 of the Articles of War], which, with some slight modifications, has come down from our original code of 1775, which derived it from a corresponding British article, has always been interpreted as subjecting the descriptions of persons specified, not only to the orders made for the government and discipline of the command to which they may be attached, but also to trial by court-martial for violations of the military code. Protected as they are by the military arm, they owe to it the correlative obligation of obedience; and a due consideration for the *morale* and discipline of the troops . . . .[60]

This jurisdiction was invoked routinely to prosecute a wide variety of both common-law and military offenses committed by civilian augmentees.[61] World War II provided some of the most interesting examples of the range of offenses resulting in the court-martial of civilians.[62] These included not only common-law offenses that civilians would be prosecuted for in civilian jurisdiction, such as assault and larceny, but also offenses unique to the military, such as desertion.[63]

In 1950 U.S. military law was radically transformed and unified among all the branches of the armed forces. This transformation took the form of the UCMJ.[64] Enacted by Congress under its constitutional authority to make rules for the land and naval forces,[65] the UCMJ unified criminal and disciplinary process for the entire armed forces, established the jurisdiction of military courts, and established offenses falling

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of War, Congress recognized a need to control and discipline the many civilians accompanying our expeditionary forces and thus adopted Article 2(d) . . . .").

59. The First Continental Congress adopted the Articles of War in June, 1775. Article LXIII allowed military officials to employ punitive measures against both soldiers and "independent company." *See* 2 LIBRARY OF CONGRESS, JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 121 (1905).

60. WINTHROP, *supra* note 56, at 98 (citations omitted). For an excellent discussion of the history of military jurisdiction over civilians, see also Peters, *supra* note 10, at 376–84.

61. *See* Melson, *supra* note 35, at 294–302.

62. *See* Michael E. Guillory, *Civilianizing the Force: Is the United States Crossing the Rubicon?*, 51 A.F. L. REV. 111, 118 (2001); *see also* Melson, *supra* note 35, at 289–93.

63. *See* Melson, *supra* note 35, at 289–94, 307.

64. Pub. L. 81-506, 64 Stat. 107 (1950) (current version at 10 U.S.C. §§ 801–946 (2000)). The UCMJ now contains a total of 146 articles applicable to all of the armed forces, including the U.S. Coast Guard. While some military service has developed certain restrictions on the implementation of the UCMJ, the statute binds all equally. *See* 10 U.S.C. §§ 801–946 (2000).

65. U.S. CONST. art. I, § 8, cl. 14.

under such jurisdiction.[66] Congress explicitly established personam jurisdiction of military courts in Article 2 of the Code, limiting such jurisdiction to specifically defined categories of citizens and aliens. Under this article, the Code—in other words the full corpus of the UCMJ—was applicable only to those individuals defined by Article 2 as "subject to the code."[67] In keeping with historical practice, however,

66. *See* 10 U.S.C. §§ 877–943.

67. Article 2 lists twelve categories of individuals subject to the Code. Obvious among these are members of the armed forces, reserves in federal service, cadets and midshipmen. As amended, Article 2 of the UCMJ now reads:

> § 802. Art. 2. Persons subject to this chapter
>
> (a) The following persons are subject to this chapter:
>
> (1) Members of a regular component of the armed forces, including those awaiting discharge after expiration of their terms of enlistment; volunteers from the time of their muster or acceptance into the armed forces; inductees from the time of their actual induction into the armed forces; and other persons lawfully called or ordered into, or to duty in or for training in, the armed forces, from the dates when they are required by the terms of the call or order to obey it.
>
> (2) Cadets, aviation cadets, and midshipman.
>
> (3) Members of a reserve component while on inactive-duty training, but in the case of members of the Army National Guard of the United States or the Air National Guard of the United States only when in Federal service.
>
> (4) Retired members of a regular component of the armed forces who are entitled to pay.
>
> (5) Retired members of a reserve component who are receiving hospitalization from an armed force.
>
> (6) Members of the Fleet Reserve and Fleet Marine Corps Reserve.
>
> (7) Persons in custody of the armed forces serving a sentence imposed by a court-martial.
>
> (8) Members of the National Oceanic and Atmospheric Administration, Public Health Service, and other organizations, when assigned to and serving with the armed forces.
>
> (9) Prisoners of war in custody of the armed forces.
>
> (10) In time of war, persons serving with or accompanying an armed force in the field.
>
> (11) Subject to any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, persons serving with, employed by, or accompanying the armed forces outside the United States and outside the Commonwealth of Puerto Rico, Guam, and the Virgin Islands.
>
> (12) Subject to any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, persons within an area leased by or otherwise reserved or acquired for the use of the United States which is under the control of the Secretary concerned and which is outside the United States and outside the Commonwealth of Puerto Rico, Guam, and the Virgin Islands.
>
> (13) Lawful enemy combatants (as that term is defined in section 948a(2) of this title) who violate the law of war.
>
> (b) The voluntary enlistment of any person who has the capacity to understand the significance of enlisting in the armed forces shall be valid for purposes of jurisdiction under subsection (a) and a change of status from civilian to member of the armed forces shall be effective upon the taking of the oath of enlistment.
>
> (c) Notwithstanding any other provision of law, a person serving with an armed force who—

Article 2 also included among those subject to military jurisdiction "[i]n time of war, persons serving with or accompanying an armed force in the field."[68]

There is no clear explanation why the "time of war" qualifier was placed on this category of jurisdiction. Perhaps it was intended to reflect the tradition of subjecting civilians to military criminal jurisdiction only in those situations when civilians supported wartime missions. Nonetheless, the "time of war" qualifier did not impede the use of this provision to prosecute U.S. civilians in post-war Germany, a common practice.[69] Indeed, the meaning of "in time of war" would not become an issue for the application of this grant of jurisdiction until 1970,

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(1) submitted voluntarily to military authority;

(2) met the mental competence and minimum age qualifications of sections 504 and 505 of this title at the time of voluntary submissions to military authority;

(3) received military pay or allowances; and

(4) performed military duties;

is subject to this chapter until such person's active service has been terminated in accordance with law or regulations promulgated by the Secretary concerned.

(d)(1) A member of a reserve component who is not on active duty and who is made the subject of proceedings under section 815 (article 15) or section 830 (article 30) with respect to an offense against this chapter may be ordered to active duty involuntary for the purpose of—

(A) investigation under section 832 of this title (article 32);

(B) trial by court-martial; or

(C) non judicial punishment under section 815 of this title (article 15).

(2) A member of a reserve component may not be ordered to active duty under paragraph [one] except with respect to an offense committed while the member was—

(A) on active duty; or

(B) on inactive-duty training, but in the case of members of the Army National Guard of the United States or the Air National Guard of the United States only when in Federal service.

(3) Authority to order a member to active duty under paragraph (1) shall be exercised under regulations prescribed by the President.

(4) A member may be ordered to active duty under paragraph (1) only by a person empowered to convene general courts-martial in a regular component of the armed forces.

(5) A member ordered to active duty under paragraph (1), unless the order to active duty was approved by the Secretary concerned, may not—

(A) be sentenced to confinement; or

(B) be required to serve a punishment of any restriction on liberty during a period other than a period of inactive-duty training or active duty (other than active duty ordered under paragraph (1)).

(e) The provisions of this section are subject to section 876b(d)(2) of this title (article 76b(d)(2)).

10 U.S.C.A. § 802 (West 2007) (bold omitted).

68. *Id.* § 802(a)(10).

69. *See* Reid v. Covert, 354 U.S. 1, 3 (1957). *Reid* is perhaps the best example of this practice that ultimately ran afoul of constitutional scrutiny. But Reid's court-martial reflects the practice followed before the Supreme Court decision in that case.

twenty years after the passage of the UCMJ, in a case that would alter the application of this jurisdiction for nearly four decades.[70]

But it was the U.S. Supreme Court that first raised questions regarding the legitimacy of subjecting U.S. civilians to the jurisdiction of military courts.[71] In a 1957 decision involving a challenge to the constitutionality of a different provision of Article 2 establishing military jurisdiction over civilians associated with the armed forces,[72] the Court issued a landmark decision that has, perhaps inappropriately, cast doubt on the constitutional validity of subjecting civilian augmentees to the UCMJ. Until that year, it was routine, and in fact sometimes required by status-of-forces agreements with receiving states,[73] to sub-

70. United States v. Averette, 19 C.M.A. 363 (1970).

71. Reid v. Covert, 354 U.S. 1 (1957).

72. *Id.* at 1.

73. Status-of-force agreements are international agreements, usually executive agreements, establishing the legal rights and duties of U.S. forces and associated personnel stationed in the territory of another state. These agreements almost always include provisions establishing the jurisdiction over these U.S. personnel. These provisions normally provide for either concurrent jurisdiction for offenses in violation of both U.S. and receiving state law, or exclusive jurisdiction granted to the United States. *See* OPERATIONAL LAW HANDBOOK, *supra* note 5, at 383, which explains:

> a. *Historically.* Scant formal international law governed the stationing of friendly forces on a host nation's territory. Most frequently, the law of the flag was applied, which basically held that since the friendly forces were transiting a host nation's territory with their permission, it was understood that the nation whose forces were visiting retained jurisdiction over its members. After World War II, with the large increase in the number of forces stationed in friendly countries, more formal SOFAs were deemed necessary to address the many and diverse legal issues that would arise, and to clarify the legal relationships between the countries. SOFAs varied in format and length, ranging from complex multi-lateral agreements, such as the NATO SOFA and its accompanying country supplements, to very limited, smaller-scale one-page Diplomatic Notes. Topics addressed in SOFAs may cover a large variety of issues.
>
> b. *Status/FCJ.* One of the most important deployment issues is criminal jurisdiction. The general rule of international law is that a sovereign nation has jurisdiction over all persons found within its borders. There can be no derogation of that sovereign right without the consent of the Receiving State and, in the absence of agreement, U.S. personnel are subject to the criminal jurisdiction of the Receiving State. On the other hand, the idea of subjecting U.S. personnel to the jurisdiction of a country in whose territory they are present due solely to orders to help defend that country raises serious problems. In recognition of this, and as a result of the Senate's advice and consent to ratification of the NATO SOFA, DoD policy, as stated in DoDD 5525.1, is to maximize the exercise of jurisdiction over U.S. personnel by U.S. authorities.
>
> c. *Exception.* An exception to the general rule of Receiving State jurisdiction is deployment for combat, wherein U.S. forces are generally subject to exclusive U.S. jurisdiction. As the exigencies of combat subside, however, the primary right to exercise criminal jurisdiction may revert to the Receiving State or come under another jurisdictional structure established in a negotiated agreement with the Receiving State.

ject civilian dependents of military personnel to U.S. military jurisdiction.[74] The jurisdiction to do so was provided for in Article 2(11) of the Code, which provides that "subject to any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, persons serving with, employed by, or accompanying the armed forces outside the United States and outside the Commonwealth of Puerto Rico, Guam, and the Virgin Islands."[75]

Under this jurisdictional grant, military commanders court-martialed civilians stationed overseas when the nation hosting U.S. forces granted the military jurisdiction for the misconduct of military and associated U.S personnel.[76] Such jurisdictional grants were a common feature of stationing, or "status of forces agreements."[77] This jurisdictional provision of the Code came under scrutiny by the Supreme Court in 1957, in two consolidated cases.[78] Both cases involved the trial and conviction by general court-martial of U.S. civilian spouses for murdering their military husbands.[79] In both cases, the U.S. military commanders exercised jurisdiction pursuant to stationing agreements that granted the military jurisdiction over offenses committed by not only members of the armed forces, but by all accompanying civilians, including family members.[80] Military authorities followed the practice of relying on Article 2(11) as a source of military-criminal jurisdiction, and both civilian defendants were tried and convicted by military courts.[81]

Petitioners challenged the constitutionality of being subjected to criminal sanction by the federal government without the full protections of the Bill of Rights.[82] Among the rights not afforded by the military courts included indictment by grand jury, trial by a jury of one's peers, unanimous verdict, and trial before an Article III life-tenured judge.[83]

In response, the Supreme Court struck down the constitutionality of reliance on Article 2(11) as a source of jurisdiction over civilians associated with the armed forces overseas, even if such jurisdiction were

74. *See* Schmitt, *supra* note 53, at 61–63.

75. 10 U.S.C. § 802(a)(11) (2000).

76. *See* Melson, *supra* note 35, at 288–302.

77. *See* OPERATIONAL LAW HANDBOOK, *supra* note 5, at 383.

78. Reid v. Covert, 354 U.S. 1, 5 (1957).

79. *Id.* at 3–4.

80. *Id.*

81. *Id.*

82. *Id.* at 3.

83. *Id.* at 21 ("Under the grand design of the Constitution civilian courts are the normal repositories of power to try persons charged with crimes against the United States. And to protect persons brought before these courts, Article III and the Fifth, Sixth, and Eighth Amendments establish the right to trial by jury, to indictment by a grand jury and a number of other specific safeguards. By way of contrast, jurisdiction of military tribunals is a very limited and extraordinary jurisdiction . . . .").

granted to the United States by treaty or by executive agreement.[84] The Court held that the provision created an unavoidable conflict with the Bill of Rights, and that although the military-justice system permits deviation from some of those rights, such deviation must be limited to individuals appropriately connected to the armed forces.[85] Only such members of the force triggered, according to the Court, the unique justification of maintaining good order and discipline within the force. It was this justification that was treated by the Court at the critical distinction between the civilian- and military-justice systems, and on which the legitimacy of the latter rested.[86]

Constitutional-law textbooks cite *Reid* for the proposition that there is no territorial limit to the constitutional rights that U.S. citizens enjoy.[87] But on the more precise issue of military jurisdiction over civilians, the decision raises questions about the constitutionality of such jurisdiction. The uncertainty created by the opinion is not, however, limited to military jurisdiction established by treaty or executive agreement. Instead, the opinion casts doubt on the constitutionality of any assertion of military jurisdiction over U.S. civilians, even under Article 2(10) of the Code. Two aspects of the opinion create this uncertainty.

First, in its holding, the *Reid* Court emphasized that it was reaching only the issue of the constitutionality of Article 2(11).[88] This provision of the Code was held invalid because it effectively nullified the fundamental constitutional rights of U.S. citizens pursuant to the interaction between statute and international agreement.[89] The exact provision of the UCMJ at issue in that case was explained by the Court as follows: "At the time of Mrs. Covert's alleged offense, an executive agreement was in effect between the United States and Great Britain which permitted United States' military courts to exercise exclusive jurisdiction over offenses committed in Great Britain by American servicemen or their dependents."[90]

Second, the Court also emphasized the problematic nature of subjecting citizens to military jurisdiction whenever their association to the armed forces seemed somewhat incidental.[91] According to the Court, the key consideration was whether the individual subjected to military

84. *Id.* at 34–35.

85. *Id.* at 33.

86. *Id.* 20–39.

87. *See, e.g.*, JESSE H. CHOPER ET AL., CONSTITUTIONAL LAW 127 (10th ed., Thomson West 2006).

88. *Reid*, 354 U.S. at 16.

89. *Id.* at 15.

90. *Id.*

91. *Id.* at 22–23.

jurisdiction was a civilian or a de facto member of the armed forces.[92] As a result, the decision did not necessarily invalidate military jurisdiction over civilians in other circumstances—such as when the civilian was working for the armed forces in a theater of war—a point emphasized by the Court:[93]

> Even if it were possible, we need not attempt here to precisely define the boundary between "civilians" and members of the "land and naval Forces." We recognize that there might be circumstances where a person could be "in" the armed services for purposes of Clause 14 even though he had not formally been inducted into the military or did not wear a uniform.[94]

The *Reid* Court held that civilian dependents were not "in" the armed forces for purposes of constitutional rights.[95] But because the Court chose not to define precisely the boundary between civilians who were associated with the armed forces but who remained civilians for constitutional purposes, and those who became de facto members of the armed forces, the conditions necessary to remove civilian augmentees from the sweep of the decision remained unclear.

This uncertainty apparently did not influence the military practice of asserting jurisdiction over civilians "accompanying the force." Although military commanders ceased to assert such jurisdiction over civilian dependants, they continued to do so over civilian augmentees working in support of the armed forces in theaters of combat operations.[96] It was not until 1970 that the exercise of military jurisdiction over these civilians fell prey to judicial challenge, ironically not by the Supreme Court, but by the highest military appellate court—the U.S. Court of Military Appeals ("COMA").[97] In *United States v. Averette*, a

92. *Id.*

93. *Reid* did not lead to amendment of the UCMJ. Instead, new approaches were developed for dealing with criminal misconduct of civilian dependents and other employees serving in foreign locations not during wartime. The most common approach was to grant both the United States (the sending state) and the host state (the receiving state) concurrent jurisdiction over offenses that violate both U.S. and receiving state law. These status-of-forces provisions thereby ensured that serious misconduct committed by U.S. civilians could be prosecuted in the courts of the receiving state. *See* OPERATIONAL LAW HANDBOOK, *supra* note 5, at 132–33.

94. *Reid*, 354 U.S. at 22–23.

95. *Id.* at 23.

96. *See* Melson, *supra* note 35, at 293–307.

97. Today, COMA is called the United States Court of Appeals for the Armed Forces ("CAAF"). *See* 10 U.S.C. §§ 941–946 (2000). According to the Code, the court must be composed of five judges appointed by the President from "civilian life." *Id.* § 942. This court serves as the highest military-appellate court and hears appeals from decisions of the Service appellate courts, such as the Army Court of Criminal Appeals (Service courts are composed of military judges). *See* U.S. COURT OF APPEALS FOR THE ARMED FORCES, COURT BROCHURE 1 (2006), *available at* http://www.armfor.uscourts.gov/CAAFBooklet2006.pdf. According to the Court Brochure:

case that radically altered military-disciplinary authority over civilian augmentees, the COMA struck down the exercise of jurisdiction under Article 2(10) absent a formal declaration of war.[98]

Averette involved a trial by general court-martial sitting in the Republic of Vietnam.[99] Averette was a U.S. civilian contractor working for the armed forces in South Vietnam.[100] He was charged and convicted of larceny and conspiracy to commit larceny in violation of the punitive articles of the UCMJ, and sentenced to a one-year term of confinement and a $500 fine.[101] The case came to the COMA on review from the decision of the Army Court of Criminal Appeals upholding the conviction.[102] The COMA did not hold that Article 2(10) violated the Constitution in all circumstances. Instead, relying on the consternation expressed by the *Reid* Court over subjecting U.S. civilians to military jurisdiction, the court concluded that the gravity of such a deprivation of fundamental constitutional rights required the court to interpret strictly and narrowly the meaning of "time of war" in Article 2(10).[103] Accordingly, given the absence of a formal declaration of war, it was unconstitutional for the military tribunal to impose its jurisdiction on civilians:

> We emphasize our awareness that the fighting in Vietnam qualifies as a war as that word is generally used and understood. By almost any standard of comparison—the number of persons involved, the level of casualties, the ferocity of the combat, the extent of the suffering, and the impact on our nation—the Vietnamese armed conflict is a major military action. But such a recognition should not serve as a

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The United States Court of Appeals for the Armed Forces exercises worldwide appellate jurisdiction over members of the armed forces on active duty and other persons subject to the Uniform Code of Military Justice. The Court is composed of five civilian judges appointed for 15-year terms by the President with the advice and consent of the Senate.

Cases on the Court's docket address a broad range of legal issues, including constitutional law, criminal law, evidence, criminal procedure, ethics, administrative law, and national security law. Decisions by the Court are subject to direct review by the Supreme Court of the United States.

> *The Court, an independent tribunal established under Article I of the Constitution, . . . regularly interprets federal statutes, executive orders, and departmental regulations. The Court also determines the applicability of constitutional provisions to members of the armed forces. Through its decisions, the Court has a significant impact on the state of discipline in the armed forces, military readiness, and the rights of servicemembers. The Court plays an indispensable role in the military justice system.*

Id. (quoting S. REP. No. 101-81, at 171 (1989)).

98. 19 C.M.A. 363, 364 (1970).

99. *Id.* at 363.

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.* at 365.

> shortcut for a formal declaration of war, at least in the sensitive area of subjecting civilians to military jurisdiction.[104]

That the civilian worked for the armed forces in a theater of active-combat operations, enjoyed privileges and immunities granted to members of the armed forces, resided on a military installation, or performed duties essential to the operations of the armed forces did not alter the court's conclusion.

No further review altered the decision of the COMA, and *Averette* thus became the controlling law for the armed forces. Because the prospect of a formally declared war seemed virtually inconceivable at that time of American history, the decision essentially nullified Article 2(10). Accordingly, for the following thirty-six years, military legal experts learned, assumed, and advised that civilian augmentees were beyond the scope of military criminal jurisdiction, regardless of the nature of their misconduct or the impact on the command or mission.[105]

III. THE WALL COMES DOWN, THE MILITARY MOVES OUT, AND CIVILIAN MISCONDUCT BECOMES A FLASHPOINT

Congress took no action in response to the *Averette* decision to amend Article 2(10).[106] This is not surprising considering the context of the decision and the mood of the nation and the Congress. By 1970 the conflict in Vietnam was becoming increasingly unpopular,[107] and the prospect of asserting greater military authority over civilians would have been inconsistent with the broader anti-war and anti-military sentiment. A critical view by certain members of the court toward the military-justice system in general may also have impacted the outcome of this

104. *Id.* at 365–66.

105. *See* Schmitt, *supra* note 53, at 74–75. According to Schmitt, who worked on the development of MEJA:

> [I]n 1979, the General Accounting Office (GAO) issued a report on the problem. The GAO found that in 1977, 343,000 civilians had accompanied the forces abroad in a twelve-month period and that, during that year, host countries exercised their jurisdiction in 200 serious cases. The GAO also found that host countries waived their right to prosecute in fifty-nine serious cases (including rape, manslaughter, rape, arson, robbery, and burglary) and in fifty-four less serious cases (including simple assault, drug abuse, and drunkenness). The GAO concluded that the lack of criminal jurisdiction over civilians and the inadequacy of administrative sanctions caused serious morale and discipline problems in overseas military communities. In the report, the GAO recommended that Congress enact legislation to extend criminal jurisdiction over American citizens accompanying the forces overseas.

Id. at 74.

106. Section 802(a)(10) of the UCMJ was not modified until section 552 of the John Warner National Defense Authorization Act for Fiscal Year 2007.

107. *See, e.g.*, Rick Lyman & Christopher Drew, *33 Years Later, Draft Becomes Topic for Dean*, N.Y. TIMES, Nov. 22, 2003, at A1 ("[In 1970,] medical deferments were a frequently used avenue for those reluctant to take part in the unpopular war in Vietnam.").

case.[108]

Congressional acceptance of this jurisdiction nullification was likely attributable to a variety of factors. Perhaps most significant was that during this period there was not a "theater of combat operations" to implicate the need for such jurisdiction.[109] During the peak of the Cold War, the U.S. military was principally a "forward deployed" force, with large numbers of military and associated civilian personnel stationed in countries with well-developed legal systems.[110] Status agreements generally governed the presence of these forces, with designation of jurisdiction a key component.[111] Under most of these agreements, U.S. personnel—both military and civilian—were subject to the concurrent jurisdiction of the host nation and of the United States.[112]

For military personnel, this meant that an act of criminal misconduct that violated both host-nation law and the UCMJ could be prosecuted in local courts or by court-martial.[113] Offenses that violated only the UCMJ fell under the military's exclusive jurisdiction. But for civilian augmentees (and dependants), the grant of concurrent jurisdiction to the United States in such agreements was essentially a nullity, because no U.S. court existed with authority to exercise such jurisdiction.[114] Instead, when civilians committed criminal misconduct that violated the UCMJ and host-nation law, they would de facto be subject to the exclusive jurisdiction of the host nation.[115] Although this method of dealing

108. *See* Melson, *supra* note 35, at 311–13 (providing an excellent discussion of the background factors ostensibly influencing the COMA at the time of the *Averette* decision).

109. After the termination of U.S. military involvement in Vietnam, U.S. defense efforts once again returned to preparation to fight the Soviet threat. This period was marked by a "rebuilding" of the armed forces and revisions of U.S. military doctrine to prepare for such a contingency. During this period, most U.S. forces operating outside the United States were forward deployed to mature theaters of operations pursuant to status-of-forces agreements, such as allied countries in Western Europe and the Far East. Actual combat operations between 1973 and 1991 were characterized by short duration with minimal need for a robust civilian-augmentee presence. *See* 2 U.S. ARMY CTR. FOR MILITARY HISTORY, AMERICAN MILITARY HISTORY 251–283 (2005) (addressing the evolution of the U.S. Army during the Cold War period).

110. *Id.*

111. *See* OPERATIONAL LAW HANDBOOK, *supra* note 5, at 383–84 (explaining the jurisdictional scheme of the North Atlantic Treaty Alliance Status of Forces Agreement).

112. *See* Agreement Under Article IV of the Mutual Defense Treaty Between the United States of America and the Republic of Korea, Regarding Facilities and Areas and the Status of United States Armed Forces in the Republic of Korea, U.S.-S. Korea, art. XXII, ¶ 2(a), July 9, 1966, 2 U.S.T. 1677 [hereinafter Mutual Defense Treaty].

113. *See* OPERATIONAL LAW HANDBOOK, *supra* note 5, at 383–84; *see also* Mutual Defense Treaty, *supra* note 112, art. XXII, ¶ 2(a).

114. *See* OPERATIONAL LAW HANDBOOK, *supra* note 5, at 137–38; *see also* Schmitt, *supra* note 6, at 516.

115. According to the Operational Law Handbook:

> Contractor employees are not subject to military law under the UCMJ when accompanying U.S. forces, except during a declared war. When a contractor is

with civilian misconduct did not always satisfy the concerns of U.S. commanders, and although in some cases this method produced arbitrary results, it was generally accepted as an effective accommodation of interests.

This all began to change with the end of the Cold War. That event led to two primary developments that sparked concerns over the lack of viable U.S. jurisdiction over civilians augmenting the operations of the armed forces abroad. First, the armed forces underwent a major downsizing.[116] As part of this process, the U.S. military became increasingly reliant on the support of civilian contractors to augment military operations and perform functions previously performed by the much larger Cold War force.[117] This civilianization process was intended to enhance what military personnel refer to as the "tooth to tail ratio"—maximizing the number of uniformed personnel to conduct combat operations by minimizing the number necessary to provide logistical support.[118] The emphasis on accomplishing this goal along with the continued downsizing of the armed forces led to an ever-increasing reliance on these civilians. As noted by one author:

> The startling growth in the ratio of contractors compared to active duty service members during overseas deployments demonstrates the policy in practice. During the Gulf War in 1991, slightly more than five thousand contractors helped support half a million troops. In the Balkans, from 1995 to 2000, contractors actually outnumbered active duty forces by three thousand civilian personnel. With approximately 138,000 service members currently serving in the Iraqi Campaign (a number that has remained fairly static over the last three years), an American Bar Association report estimates that

involved in criminal activity, international agreements and the host nation's laws take precedence.

OPERATIONAL LAW HANDBOOK, *supra* note 5, at 136.

116. *See* P.W. Singer, *Outsourcing War*, FOREIGN AFF., Mar.–Apr. 2005, at 119, 120.

117. *See id.* at 123; *see also* Schmitt, *supra* note 6, at 517.

118. According to William C. Peters:

> During this reduction of active duty strength, military deployments in support of peace-keeping and humanitarian interventions, dramatically increased the services' operational tempo. Forces were deployed to Somalia, Haiti, the Balkans, and even Florida. Notwithstanding these often overlapping operations, the Clinton Administration embarked on its "reinventing government" campaign. In conjunction with the passage of the 1998 Federal Activities Inventory Reform Act, which outsourced positions deemed other than inherently governmental when economically efficient to do so, the administration continued military cutbacks. The Secretary of Defense, William Cohen, announced the policy of military streamlining in 1997: "We can sustain the shooters and reduce the supporters—we can keep the tooth, but cut the tail." Cohen's announcement "prefaced modern military's unprecedented reliance on civilian contractors."

Peters, *supra* note 10, at 381–82 (citations omitted).

> there are about thirty thousand U.S. contractors operating in Iraq, or "about 10 times the ratio during the 1991 Persian Gulf conflict." When foreign workers actively engaged in the reconstruction and oil work are added to the government contractor mix, the numbers swell as high as 50,000 to 75,000. If we recall from evidence introduced earlier that fewer than ten thousand civilians supported over half a million troops in Vietnam, the phenomenon's picture is complete.[119]

Perhaps more important than the requirement to use civilians to enhance this "tooth to tail ratio" was the second development: The U.S. military began to conduct an increasing number of expeditionary military operations. These ranged from the full-scale combat operation of the first Iraq war, to a wide array of peacekeeping operations in locations such as Bosnia, Kosovo, Haiti, and Somalia.[120] These two changes in the nature of the armed forces and the missions they were conducting converged to produce a new military–civilian paradigm, in which civilian augmentees were a constant and increasingly essential part of military operations in locations where reliance on the host nation to address their misconduct was never a viable option.

This soon led to concerns that U.S. civilians were effectively immune from criminal sanctions for their misconduct, regardless of how egregious that misconduct might be.[121] The only real response available to commanders for such misconduct was to terminate the civilian-employment relationship with the military and request that the civilian be removed from the operational area.[122] How could the command maintain credibility when a civilian associated with the unit (even if not technically subject to the authority of the commander) committed a seri-

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119. *Id.* at 382–83 (citations omitted).

120. *See* Rebecca Rafferty Vernon, *Battlefield Contractors: Facing the Tough Issues*, 33 PUB. CONT. L.J. 369, *passim* (2004).

121. *See* Becker, *supra* note 12, at 277–78 (describing how the son of an U.S. serviceman stationed in Japan got off easy by being convicted of involuntary manslaughter, even though the son stabbed to death another U.S. serviceman's son); *see also* Perlak, *supra* note 5, at 98–99. According to Perlak:

> With court-martial jurisdiction effectively removed by the courts, it devolved to Congress to come up with a legal scheme that would fill the gap. From the very outset in 1957, up to the present day, no court has ever questioned the ability of Congress to do exactly that. Federal criminal laws with extraterritorial effect have existed for years. Likewise, jurisdiction over land under military control or put to military use within the United States has existed under the special maritime and territorial jurisdiction of the United States. However, because this jurisdiction has no extraterritorial effect, there have been conspicuous gaps. Courts have employed a rule of statutory construction providing a presumption that a law does not have extraterritorial effect unless there is clear congressional intent to make it so.

Id. (citations omitted).

122. *See* OPERATIONAL LAW HANDBOOK, *supra* note 5, at 135–36; *see also* Perlak, *supra* note 5, at 120 ("There is an existing scheme of control, however, based on contract terms and parameters of performance.").

ous criminal offense, such as murder or rape of a local national? What impact would it have on the morale of the military force when they realized that a double standard exists as the result of their being subject to court-martial for misconduct while their civilian counterparts were effectively immune? How could a commander ensure compliance with his or her obligations under the laws of war if a civilian augmentee commits a war crime and the commander has no meaningful disciplinary option to respond to such misconduct?

In the mid-1990s, during the height of the "peacekeeping" era, these concerns led Congress, working with the Department of Defense and the Department of State, to address the issue of criminal jurisdiction over civilian augmentees.[123] One option available to Congress, and perhaps the easiest option, would have been to reverse the holding of *Averette* by amending either the "time of war" provision of Article 2(10) or some other statute to indicate that "time of war" was not intended to be narrowly restricted to formally declared war, but rather was to be interpreted more broadly so as to apply to any active-military operation. Congress, however, did nothing to alter the post-*Averette* status quo.[124]

Rather, Congress chose to enact legislation establishing federal criminal jurisdiction over civilian augmentees for serious criminal misconduct committed outside the jurisdiction of the United States. Through the MEJA, Congress made applicable to civilians accompanying the armed forces overseas (irrespective of the nature of the mission or operation) those offenses applicable to any civilian in the Special Maritime or Territorial Jurisdiction of the United States.[125] Accordingly, civilian augmentees became liable for all offenses contained in Title 18 of the United States Code, including civilian-type offenses such as homicide, sexual assault, larceny, and arson.[126] Congress did not specify how to implement this statute, delegating that task to the Secretary of Defense.[127]

Since enactment, MEJA has not been particularly effective.[128] It

123. *See* Perlak, *supra* note 5, at 99–100.

124. *See* Peters, *supra* note 10, at 372.

125. 18 U.S.C. § 3261 (2000); *see also* Perlak, *supra* note 5, at 99–100.

126. *See* Perlak, *supra* note 5, at 98–99.

127. *See* 18 U.S.C. § 3266(a) (2000) ("The Secretary of Defense, after consultation with the Secretary of State and the Attorney General, shall prescribe regulations governing the apprehension, detention, delivery, and removal of persons under this chapter and the facilitation of proceedings under section 3265. Such regulations shall be uniform throughout the Department of Defense.").

128. *See* Peters, *supra* note 10, at 386 ("[T]he tens of thousands of contractors who have served or are currently serving in the Iraqi campaign have either scrupulously avoided any meaningful misconduct, or government efforts to address those crimes are either lacking or simply ineffective in practice."); *id.* at 391 ("[F]ederal prosecutors have yet to employ MEJA for any alleged misconduct of civilian contractors arising from their actions during the Iraqi campaign.").

was not until 2005 that the Department of Defense finally published an implementing instruction.[129] But perhaps more problematic is that as implemented, the statute relies on U.S. Attorneys to "accept" cases referred to them from an overseas-military command.[130] This procedure alone makes it unsurprising that there has not been a strong appetite for prosecuting civilians for MEJA violations. Further, the overall complexity of initiating, coordinating, and managing such a case also undoubtedly contributes to this lack of appetite.[131] The several MEJA cases that have been prosecuted, however, indicate that if applied, MEJA can be effective in responding to civilian-criminal misconduct.[132]

During this period Congress also passed the WCA, which provides federal criminal jurisdiction over civilian augmentees.[133] Unlike MEJA, this statute was not motivated primarily by the concerns related to civil-

129. *See* DEP'T OF DEF., INSTRUCTION NO. 5525.11, CRIMINAL JURISDICTION OVER CIVILIANS EMPLOYED BY OR ACCOMPANYING THE ARMED FORCES OUTSIDE THE UNITED STATES, CERTAIN SERVICE MEMBERS, AND FORMER SERVICE MEMBERS (2005), http://www.dtic.mil/whs/directives/corres/pdf/552511p.pdf [hereinafter INSTRUCTION NO. 5525.11]; *see also* Peters, *supra* note 10, at 391.

130. INSTRUCTION NO. 5525.11, *supra* note 129, ¶ 6.2.2.1. This paragraph provides:

> When a Military Criminal Investigative Organization is the lead investigative organization, the criminal investigator, in order to assist the DSS/DOJ and the designated U.S. Attorney representative (once the DSS/DOJ has made the designation), in making a preliminary determination of whether the case warrants prosecution under the Act, shall provide a copy of the Investigative Report, or a summary thereof, to the Office of the Staff Judge Advocate of the Designated Commanding Officer (DCO) (as defined in enclosure 2) at the location where the offense was committed for review and transmittal, through the Commander of the Combatant Command, to the DSS/DOJ and the designated U.S. Attorney representative. The Office of the Staff Judge Advocate shall also furnish the DSS/DOJ and the designated U.S. Attorney representative an affidavit or declaration from the criminal investigator or other appropriate law enforcement official that sets forth the probable cause basis for believing that a violation of the Act has occurred and that the person identified in the affidavit or declaration has committed the violation.

131. For example, the implementing instruction requires coordination between the responsible military command and the host nation; the responsible military command and the Department of Defense General Counsel; the Department of Defense General Counsel and the Department of Justice; the Defense Criminal Investigation Service and the Department of Justice; the Department of Justice and the U.S. Attorney in whose venue the case lies. *Id.*

132. *See* Press Release, Dep't of Justice, Former Ft. Campbell Soldier Indicted in Iraqi Civilian Deaths (Nov. 2, 2006), *available at* http://louisville.fbi.gov/dojpressrel/pressrel06/iraqideaths110206.htm (discussing the indictment of a former soldier under MEJA for the rape and murder of an Iraqi girl); *Abu Ghraib Contractor Sentenced for Child Porn*, MSNBC.COM, May 25, 2007, http://www.msnbc.msn.com/id/18866442/ (discussing the MEJA-based prosecution of a civilian-network administrator working for the armed forces at the Baghdad Central Confinement Facility in Abu Ghraib).

133. 18 U.S.C. § 2441(a) (2000) ("Whoever, whether inside or outside the United States, commits a war crime . . . shall be fined under this title or imprisoned for life or any term of years, or both, and if death results to the victim, shall also be subject to the penalty of death.").

ian misconduct.[134] Nonetheless, the statute subjects *any* U.S. national to federal criminal jurisdiction for the commission of certain war crimes.[135] Thus, if it were established that a U.S.-national civilian augmentee engaged in criminal misconduct that qualified as an enumerated war crime under the statute and international law, the WCA would provide another source of federal criminal jurisdiction over the individual and the offense.

As a result of these developments, the jurisdictional paradigm related to civilian augmentees came to be understood by military practitioners as follows: Although the UCMJ applied extraterritorially, prosecuting civilians for violation of the Code was not a viable option to respond to civilian misconduct. Instead, when deemed appropriate, and in response to an offense in violation of Title 18 of the United States Code, the commander could initiate a process by which the case would be referred to the Department of Justice for prosecution in the United States.[136]

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134. The primary motivation for the War Crimes Act was to fulfill U.S. obligations to implement the four Geneva Conventions of 1949. These treaties include articles obligating state parties to provide domestic legislation for the prosecutions of treaty violations. *See* H.R. REP. 104-69, at 3–4 (1996). This report indicates that:

> Despite ratifying the Geneva conventions, the United States has never enacted legislation specifically implementing their penal provisions. This was felt to be unnecessary, that existing United States law provided adequate means of prosecution. The Senate Committee on Foreign Relations stated that:
>
> > The committee is satisfied that the obligations imposed upon the United States by the "grave breaches" provisions are such as can be met by existing legislation enacted by the Federal Government within its constitutional powers. A review of that legislation reveals that no further measures are needed to provide effective penal sanctions or procedures . . . .
>
> A review of current federal and state law indicates that while there are many instances in which individuals committing grave breaches of the Geneva conventions may already be prosecuted, prosecution would be impossible in many other situations.

Id. (footnote omitted) (quoting *Geneva Conventions for the Protection of War Victims: Hearing Before the S. Comm. on Foreign Relations*, 84th Cong., 1st Sess. 27 (1955)). Although ratified in 1954, it was not until 1996 that the United States met this obligation to enact such legislation. The War Crimes Act, as amended, establishes federal criminal jurisdiction over any U.S. national who violates certain provisions of the law of war. This jurisdiction provides an effective gap filler to reach members of the armed forces who commit war crimes but who separate from the armed forces before discovery of the offense (military jurisdiction ceases to apply on discharge from the armed forces). But the jurisdictional language is broad enough to reach any U.S. resident who violates the applicable law-of-war obligations to include civilian augmentees. *See* Military Commissions Act of 2006, Pub. L. No. 109-366, § 6(b), 120 Stat. 2600, 2633 (to be codified at 18 U.S.C. § 2441).

135. *See* 18 U.S.C.A § 2441(b) (West 2007).

136. *See* INSTRUCTION No. 5525.11, *supra* note 129, ¶ 5.1. The Department of Defense also declared that:

> Although some Federal criminal statutes are expressly or implicitly extraterritorial, many acts described therein are criminal only if they are committed within "the

With as many as 70,000 civilian contractors associated with military operations in Iraq, this paradigm came under increasing scrutiny.[137] This scrutiny was most significant in relation to civilian contractors involved in the interrogation of detainees. Reports of detainee abuse and even killings by such civilians led human-rights advocates to demand a more robust civilian-accountability structure.[138] Nonetheless, as is reflected in the 2005 Instruction implementing MEJA,[139] the Department of Defense continued to work within this new jurisdictional paradigm, and did not call for the resurrection of military criminal jurisdiction over civilians.[140]

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special maritime and territorial jurisdiction of the United States," or if they affect interstate or foreign commerce. Therefore, in most instances, Federal criminal jurisdiction ends at the nation's borders. . . . Similarly, civilians are generally not subject to prosecution under the UCMJ, unless Congress had declared a "time of war" when the acts were committed. As a result, these acts are crimes, and therefore criminally punishable, only under the law of the foreign country in which they occurred. However, there have been occasions where the foreign country has elected not to exercise its criminal jurisdiction and the person goes unpunished for the crimes committed. . . .

The Act and this Instruction are intended to address the jurisdictional gap in U.S. law regarding criminal sanctions, as applied to civilians employed by or accompanying the Armed Forces outside the United States, members of the Armed Forces, and former members of the Armed Forces, including their dependents. It does not enforce a foreign nation's criminal laws and, as such, does not require that the person's actions violate the foreign nation's laws and applies even if the conduct may be legal under the foreign nation's laws. The jurisdictional requirement is that the conduct be in violation of U.S. Federal laws. When, however, the same conduct violates the Act and the laws of the foreign nation, the Act provides for consideration of existing international agreements between the United States and the foreign nation.

Id. ¶¶ 2.4–2.5.

137. *See* Daniel Bergner, *The Other Army*, N.Y. TIMES, Aug. 14, 2005, § 6 (Magazine), at 29; Jonathan Finer, *Security Contractors in Iraq Under Scrutiny After Shootings*, WASH. POST, Sept. 10, 2005, at A01; Nathan Hodge, *Army Chief Notes 'Problematic' Potential of Armed Contractors on the Battlefield*, DEF. DAILY, Aug. 26, 2005; David Washburn & Bruce V. Bigelow, *In Harm's Way: Titan in Iraq*, SAN DIEGO UNION-TRIB., July 24, 2005, at A1.

138. *See, e.g.*, Paul Tait, *Shooting Shines Light on Murky World of Iraq Security*, REUTERS, Sept. 18, 2007, http://www.reuters.com/article/worldNews/idUSL1882490620070918 ("Iraq has vowed to review all local and foreign security contractors, described by critics as mercenaries who act with impunity, after a shooting incident involving U.S. firm Blackwater on Sunday in which 11 people were killed."); *see also* Amnesty International U.S.A., Corporate Accountability in the "War on Terror," http://www.amnestyusa.org/War_on_Terror/Private_Military_and_Security_Contractors/page.do?id=1101665&n1=3&n2=26&n3=157 (last visited Jan. 19, 2008).

139. *See* INSTRUCTION NO. 5525.11, *supra* note 129.

140. This perceived lack of effective mechanisms to hold civilian contractors accountable for criminal misconduct has recently become a hot-button issue as the result of the Blackwater scandal. These contractors worked under a State Department contract, which ostensibly removed them from the jurisdiction of MEJA (a loophole Congress intends to close). Contrary to popular misconception, however, this incident is as much an indication of the lack of effective implementation of existing law as it is an indication of a gap in the law. Regardless, it undoubtedly reinforces the need to ensure that contractors performing quasi-military functions in

IV. DOES THAT SAY WHAT I THINK IT SAYS?

This jurisdictional paradigm was suddenly and radically changed in October of 2006, when Congress passed the John Warner National Defense Authorization Act for Fiscal Year 2007.[141] The amended law included hundreds of provisions related to the armed forces. Although not requested by the Department of Defense, inserted among these provisions was the following amendment to the UCMJ:

> SEC. 552. CLARIFICATION OF APPLICATION OF UNIFORM CODE OF MILITARY JUSTICE DURING A TIME OF WAR.
>
> Paragraph (10) of section 802(a) of title 10, United States Code (article 2(a) of the Uniform Code of Military Justice), is amended by striking ''war'' and inserting ''declared war or a contingency operation''.[142]

With this amendment, Congress resurrected military criminal jurisdiction for the tens of thousands of U.S. civilians working for, with, or perhaps even in proximity to the armed forces in Iraq, Afghanistan, and other locations designated as "contingency operations" by the Secretary of Defense. By amending Article 2(10) to read "declared war or a contingency operation,"[143] Congress nullified the *Averette* interpretation of Article 2(10) that required a formally declared war to trigger the jurisdiction of the Code. Because virtually every conflict or nonconflict-military operation falls under the expansive definition of "contingency operation,"[144] this amendment effectively made the extraterritorial jurisdiction of the UCMJ coextensive for military and civilian personnel.

Based on the author's discussions with a number of individuals within the military-legal community, this amendment came as a complete surprise to the Department of Defense.[145] To date, instead of enthusiastically welcoming this resurrection of jurisdiction, the military services have responded cautiously.[146] No charges have been initiated

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operational areas are subject to some meaningful disciplinary and criminal-accountability mechanisms.

141. John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, 120 Stat. 2083 (2006).

142. *Id.* § 552 (bold omitted).

143. *Id.*

144. *See* 10 U.S.C. § 101(a)(13) (2000); *see also supra* Part I, note 14.

145. There is no legislative record indicating this amendment responded to a request by the Department of Defense.

146. For example, an Air Force Judge Advocate General's Talking Paper on the amendment includes the following:

- Amended Article 2(a)(10) broad enough to include embedded journalists and foreign employees of contractors
- Manual for Courts-Martial does not separately address prosecution of civilians in detail, except Analysis of R.C.M. 202 in Appendix 21, A21-11
- DoD GC representative first addressed with Joint Service Committee on 1 Feb 07

under this resurrection of jurisdiction, nor have any implementing instructions been issued by the Service Judge Advocates.[147] This is not surprising, for this resurrection has produced tremendous uncertainty, stemming from two principal concerns: First, which civilians fall within the definition of "accompanying the force"? And second, will the exercise of military-criminal jurisdiction over a U.S. civilian under this amendment withstand constitutional scrutiny?[148]

These concerns are exacerbated by the simple reality that virtually all of the jurisprudence related to these questions is decades old. Nonetheless, if this jurisprudence provides a baseline from which to interpret the scope of this provision, the answer to the question regarding the scope of application is potentially very broad.[149] During both the First and the Second World Wars, a number of cases addressed the predecessor provision of Article 2(10) in the Articles of War.[150] These held that civilians "accompanying the force" included not only civilian employees of the armed forces and contractors working for the armed forces, but also U.S. civilians whose employment with the armed forces had been terminated but who remained in the theater of operations.[151] This expansive understanding of military jurisdiction over civilians "accompanying the force" was confirmed during congressional hearings on enactment of the UCMJ, when the Assistant General Counsel for the

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– *One possibility, non-binding criteria/guidance to exercise such jurisdiction sparingly*

Air Force Judge Advocate General's Office, Talking Paper on Article 2(a)(10), UCMJ (on file with author) (emphasis added).

147. *See* 10 U.S.C. § 806(b) (imposing a statutory obligation on courts-martial convening authorities to communicate with their Judge Advocate on matters related to military justice).

148. According to Peters, this concern was actually expressed by the Department of Justice in relation to the development of MEJA:

> Similar language was proposed as an amendment to the UCMJ through the Fiscal Year 1996 Department of Defense (DOD) Authorization Act. The Department of Justice (DOJ) determined that it was likely an amendment to Article 2(a)(10) of the UCMJ, extending courts-martial jurisdiction over civilians during contingency operations in armed conflict, presented possible constitutional problems and therefore did not support that portion of the proposed amendment. Telephone Interview with John De Pue, former Senior Trial Attorney, Counterterrorism Section, Criminal Div., U.S. Dep't of Justice (Apr. 7, 2005). Mr. De Pue was the DOJ representative on the panel that considered the amendment.

Peters, *supra* note 10, at 374 n.23.

149. *See, e.g.*, Melson, *supra* note 35, at 289 ("[M]ilitary jurisdiction over civilians reached an unprecedented and expansive limit [during Word War II]."); *see also* Talking Paper on Article 2(a)(10), UCMJ, *supra* note 145.

150. *See* Hines v. Mikell, 259 F. 28, 29–30 (4th Cir. 1919); McCune v. Kilpatrick, 53 F. Supp. 80, 84 (E.D. Va. 1943); *In re* Di Bartolo, 50 F. Supp. 929, 930 (S.D.N.Y. 1943); *Ex parte* Jochen, 257 F. 200, 203 (S.D. Tex. 1919); *Ex parte* Falls, 251 F. 415, 415–16 (D.N.J. 1918); *Ex parte* Gerlach, 247 F. 616, 617 (S.D.N.Y. 1917).

151. *See* Melson, *supra* note 35, at 291–94.

Department of Defense asserted that even Red Cross workers and journalists could fall under Article 2(10) of the Code.[152]

It is difficult to conceive of a CNN journalist being charged and tried by a court-martial in Iraq simply because that journalist happened to be in the operational area of U.S. forces. It is equally difficult to conceive of a U.S. military commander pursuing such a course of action. But this extreme example highlights the uncertainty that perhaps lies behind the caution in invoking this jurisdiction by the military services. This example is also useful to reveal that the object of this amendment to the UCMJ was not to achieve such an extreme result. Instead, a more logical object was likely responsible: the desire to enhance the ability of military commanders to control and discipline civilian contractors integrally related to their units and missions.

It has long been recognized that the military-justice system is intended to serve two distinct yet hopefully complimentary functions: achieving justice while contributing to the good order and discipline of the military unit.[153] It is this latter purpose that has been so significant in justifying the continuing central role of military commanders in the military-justice process. Unlike civilians, or even most other nations'military systems, U.S. commanders are vested with enormous authority over the disposition of allegations of misconduct.[154] This authority includes charging decisions, nonjudicial diversions, the level

152. *See A Bill To Unify, Consolidate, Revise, and Codify the Articles of War, the Articles for the Government of the Navy, and Disciplinary Laws of the Coast Guard, and To Enact and Establish a Uniform Code of Military Justice: Hearings on H.R. 2498 Before the Subcomm. of the H. Comm. on Armed Services*, 81st Cong. 565, 622–23 (1949) (statement of Felix Larkin, Assistant General Counsel, Secretary of Defense).

153. In an article first written in 1954 by a major in the Judge Advocate General's Corps who would later serve as the Judge Advocate General of the Army and reach the rank of Major General, then Major George Prugh, Jr. noted this dual purpose:

> Now, it seems apparent that any American code of military justice must serve a dual purpose: (1) it must establish a framework whereby offenders are appropriately and promptly punished by means of an enlightened procedure fully in accord with the basic principles of American justice; (2) while at the same time, not only not impeding, but on the contrary, aiding the military commander in accomplishing his assigned mission.

George S. Prugh, Jr., *Observations on the Uniform Code of Military Justice: 1954 and 2000*, 165 MIL. L. REV. 21, 23 (2000).

154. *See* 10 U.S.C. §§ 801–946 (2000); *see also* DEP'T OF ARMY, CONTRACTOR DEPLOYMENT GUIDE (1998), *available at* http://www.army.mil/usapa/epubs/pdf/p715_16.pdf. The MEJA Implementing Instruction published by the Department of Defense emphasizes the relationship between military discipline and civilian misconduct: "It is DoD policy that the requirement for order and discipline of the Armed Forces outside the United States extends to civilians employed by or accompanying the Armed Forces, and that such persons who engage in conduct constituting criminal offenses shall be held accountable for their actions, as appropriate." INSTRUCTION NO. 5525.11, *supra* note 129, ¶ 3.

of court to select, the decision to send a case to trial, and the authority to approve, mitigate, or set aside a court's findings or sentence or both.

Commanders are entrusted with these authorities because, to maintain good order and discipline within a unit, misconduct must be addressed promptly in a manner that responds to the interests of the military command. It is therefore not surprising that as the numbers of civilians associated with military units in theaters of active operations have increased, the desire to subject them to command disciplinary authority has also increased. It is also completely plausible that the recent resurrection of military jurisdiction might indeed contribute to good order and discipline both by providing a more efficient criminal response to civilian misconduct and by enhancing the sense of equity among members of the uniformed force already subject to such jurisdiction. The key question, however, is not whether this provision is efficient or effective, but whether such increased efficiency in responding to civilian misconduct justifies a deprivation of fundamental constitutional rights in a criminal proceeding.

V. THE WEIGHING OF INTERESTS

Conceding the importance to the military commander of providing a viable means to hold civilian augmentees accountable for misconduct may provide justification for enhancing the military disciplinary arsenal applicable to such civilians. But this does not necessarily require the conclusion that the scope and nature of the jurisdiction resurrected by the recent amendment to the UCMJ is equally justified. The legitimacy of such jurisdiction should not be judged simply by considering the theoretical benefit that will accrue to a commander, but instead by the balance between that benefit and the costs to the individual citizen.[155] Perhaps more importantly, to ensure that the deprivation of constitutional rights is limited carefully to that which is genuinely necessary, it is critical to assess the true extent of the post-MEJA–WCA necessity. This assessment reveals that the justification provided by military interests does not extend to the scope of jurisdiction established by this amendment. In short, the scope of the resurrection of UCMJ jurisdiction over civilians is both overbroad and unnecessary.

Although *Reid* did not specifically address the constitutionality of the jurisdiction resurrected by this amendment,[156] the case provides the most applicable framework for assessing the significance of the constitutional interests at stake. This is due to the emphasis the *Reid* Court placed on preserving the rights afforded to U.S. citizens under the Con-

155. Striking such a balance seems to have been the core principle of the *Reid* decision.

156. *See supra* Part II.

stitution, even in relation to claims of military necessity. Indeed, the government argued in *Reid* that the authority vested in Congress to make rules for the land and naval forces, when coupled with the Necessary and Proper Clause of the Constitution, justified the exercise of the challenged military jurisdiction. The Court summarized this argument as follows:

> The Government argues that the Necessary and Proper Clause when taken in conjunction with Clause 14 allows Congress to authorize the trial of Mrs. Smith and Mrs. Covert by military tribunals and under military law. The Government claims that the two clauses together constitute a broad grant of power "without limitation" authorizing Congress to subject all persons, civilians and soldiers alike, to military trial if "necessary and proper" to govern and regulate the land and naval forces.[157]

This necessity theory proved unpersuasive for the Court. In rejecting the argument, the Court demonstrated that it was unwilling to endorse a deprivation of fundamental constitutional rights of citizens simply because doing so would serve military interests:

> It is true that the Constitution expressly grants Congress power to make all rules necessary and proper to govern and regulate those persons who are serving in the "land and naval Forces." But the Necessary and Proper Clause cannot operate to extend military jurisdiction to any group of persons beyond that class described in Clause 14—"the land and naval Forces." . . . Every extension of military jurisdiction is an encroachment on the jurisdiction of the civil courts, and, more important, acts as a deprivation of the right to jury trial and of other treasured constitutional protections. Having run up against the steadfast bulwark of the Bill of Rights, the Necessary and Proper Clause cannot extend the scope of Clause 14.[158]

This approach to assessing the constitutionality of depriving citizens of fundamental rights in response to a claim of military necessity should logically extend to an analysis of the recent resurrection of jurisdiction by the amendment to Article 2 (10). It is undoubtedly true that in relation to such analysis, it is more plausible to assert that civilian augmentees are, unlike civilian dependents, "members of the armed forces" for constitutional purposes. It is equally true, however, that the high value placed on preserving fundamental constitutional rights for U.S. citizens facing criminal prosecution reflected in the *Reid* opinion suggests that the government bears a heavy burden to justify such a deprivation.

It is unfortunate from an analytical standpoint that, since the *Reid*

157. Reid v. Covert, 354 U.S. 1, 20 (1954).

158. *Id.* at 20–21 (citations omitted).

decision, the status of civilian augmentees in relation to the armed forces has remained so uncertain. But there is no question that the presence of such civilians in areas of active-military operations and their importance to mission accomplishment has expanded greatly in the last two decades.[159] This undoubtedly influenced the effort to resurrect military jurisdiction over these citizens. Nonetheless, certain decisions by the armed forces undermine the proposition that civilian augmentees are "members of the armed forces" for constitutional purposes, the apparent sine qua non enunciated by the *Reid* Court for a legitimate application of military jurisdiction.[160]

Perhaps most significant among these decisions has been the continuing refusal to grant civilian augmentees some type of quasi-combatant status.[161] Affirmation of civilian status of these augmentees is reflected in the principal Department of Defense policy governing the use of contractors.[162] One interesting example of this aversion appeared

159. *See supra* Part I, note 6 and accompanying text.

160. *See Reid*, 354 U.S. at 20–21.

161. *See* Lourdes A. Castillo, *Waging War with Civilians: Asking the Unanswered Questions*, AEROSPACE POWER J., Fall 2000, at 26, 26–28 (discussing numerous short and long-term issues regarding increased contractor support to military operations).

162. *See* DEP'T OF DEF., INSTRUCTION NO. 3020.41, CONTRACTOR PERSONNEL AUTHORIZED TO ACCOMPANY THE U.S. ARMED FORCES (2005), http://www.dtic.mil/whs/directives/corres/pdf/302041p.pdf. This Instruction defines the status of civilian augmentees as follows:

> 6.1.1. *International Law and Contractor Legal Status.* Under applicable law, contractors may support military operations as civilians accompanying the force, so long as such personnel have been designated as such by the force they accompany and are provided with an appropriate identification card under the provisions of the 1949 Geneva Convention Relative to the Treatment of Prisoners of War (GPW) (reference (j)). If captured during armed conflict, contingency contractor personnel accompanying the force are entitled to prisoner of war status. Contingency contractor personnel may be at risk of injury or death incidental to enemy actions while supporting other military options. *Contingency contractor personnel may support contingency operations through the indirect participation in military operations*, such as by providing communications support, transporting munitions and other supplies, performing maintenance functions for military equipment, providing security services according to subparagraph 6.3.5, and providing logistic services such as billeting, messing, etc. Contingency contractor personnel retain the inherent right of individual self-defense as addressed in subparagraph 6.3.4. Each service to be performed by contingency contractor personnel in contingency operations shall be reviewed on a case-by-case basis in consultation with the servicing legal office to ensure compliance with relevant laws and international agreements.

Id. ¶ 6.1.1. (emphasis added). The emphasis placed on limiting the conduct of civilian augmentees to "indirect" participation in hostilities is a clear indication that they are not regarded as members of the armed forces by the United States. *See also* OFFICE OF THE JOINT CHIEFS OF STAFF, JOINT PUBLICATION 4-0, DOCTRINE FOR LOGISTIC SUPPORT OF JOINT OPERATIONS V-1 (2000), *available at* www.dtic.mil/doctrine/jel/new_pubs/jp4_0.pdf ("In all instances, contractor employees cannot lawfully perform military functions and should not be working in scenarios that involve military combat operations where they might be conceived as combatants."); DEP'T OF

in a U.S. Navy decision paper related to the proposal to grant civilian members of merchant vessels "temporary status" as members of the armed forces to avoid conflict with legal obligations related to the use of such vessels.[163] In spite of the plausible proposal put forward by proponents of this course of action, it was ultimately rejected.[164] This aversion is also reflected in the most recent Department of Defense directives related to civilian-support personnel. These directives state explicitly that civilian augmentees are not members of the armed forces for purposes of rights and obligations under the laws of war.[165] Accordingly, they are restricted from performing any function qualifying as "inherently governmental"—which is defined in other directives as functions reserved for members of the armed forces.[166] Such restrictions undermine any assertion that these civilians are "members of the force" for constitutional purposes, because it is the lack of this status that results in limiting the activities that they may be called on to perform during military operations.[167]

Even conceding, for the sake of argument, that civilian augmentees might be considered members of the armed forces for purposes of Article 2(10), the change in the legal landscape since the COMA's rejection of such jurisdiction must be considered in balancing competing interests. These changes have provided a viable legal framework for bringing criminal actions against civilian augmentees for acts of serious misconduct.[168] In assessing the impact of these federal statutes, two considerations are particularly important: (1) whether subjecting civilian

THE ARMY, USE AND MANAGEMENT OF CIVILIAN PERSONNEL IN SUPPORT OF MILITARY CONTINGENCY OPERATIONS (2004), *available at* http://www.army.mil/usapa/epubs/pdf/r690_11.pdf; DEP'T OF THE ARMY, CONTRACTORS ACCOMPANYING THE FORCE (1999), *available at* http://www.army.mil/usapa/epubs/pdf/r715_9.pdf; DEP'T OF THE ARMY, CONTRACTORS ON THE BATTLEFIELD (2003), *available at* http://www.afsc.army.mil/gc/files/fm3_100x21.pdf.

Two authors have summarized the traditionally understood mandate in the following simple yet unambiguous terms: "Non-uniformed employees of an armed force and contractor personnel of an armed force are non-combatant civilians and must never take part in hostilities." Lisa L. Turner & Lynn G. Norton, *Civilians at the Tip of the Spear*, 51 A.F. L. REV. 1, 25 (2001).

163. *See* Dep't of the Navy, Office of the Judge Advocate Gen., Civilians on Warships: Transformation of Navy Manning for the 21st Century (2006) (unpublished paper, on file with author).

164. *Id.*

165. *See* DEP'T OF THE ARMY, USE AND MANAGEMENT OF CIVILIAN PERSONNEL IN SUPPORT OF MILITARY CONTINGENCY OPERATIONS (2004), *available at* http://www.army.mil/usapa/epubs/pdf/r690_11.pdf; DEP'T OF THE ARMY, CONTRACTORS ACCOMPANYING THE FORCE (1999), *available at* http://www.army.mil/usapa/epubs/pdf/r715_9.pdf; DEP'T OF THE ARMY, CONTRACTORS ON THE BATTLEFIELD (2003), *available at* http://www.afsc.army.mil/gc/files/fm3_100x21.pdf.

166. *See* DEP'T OF DEFENSE, INSTRUCTION NO. 1100.22, GUIDANCE FOR DETERMINING WORKFORCE MIX 8, ¶ 6.1.2. (2007), *available at* http://www.dtic.mil/whs/directives/corres/pdf/110022p.pdf.

167. *Id.* at 7–8.

168. *See supra* notes 116–139 and accompanying text.

augmentees to the full corpus of the UCMJ is genuinely necessary after the enactment of MEJA and the WCA; and (2) whether the government's ineffective implementation of these federal statutes justifies the potentially more efficient, yet more intrusive, use of military jurisdiction.

In regard to the first consideration, it is critical to consider the full scope of criminal jurisdiction created by the UCMJ amendment. Unlike the MEJA, this jurisdiction is not restricted to criminal offenses normally applicable to civilians in the special territorial and maritime jurisdiction of the United States. Instead, in addition to the UCMJ prohibitions against what could reasonably be considered civilian offenses, every other offense established by the UCMJ is applicable to civilian augmentees. These offenses include offenses unique to the military, such as disobedience to orders,[169] disrespect toward superiors,[170] absence without authority,[171] desertion,[172] missing movement,[173] and misbehavior before an enemy.[174] Although difficult to imagine, the plain language of the 2006 amendment does not preclude a military commander from charging a civilian for violating one of these prohibitions. In addition, historical precedent supports charging civilian augmentees with offenses unique to the military under Article 2(10).[175]

This list of offenses made applicable to civilians also includes what is referred to as the "General Article." This article provides:

> Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court.[176]

Thus, the term "general" is indeed telling, as this article enables military prosecutors to craft a criminal charge for virtually any act or omission the commander believes is contrary to "good order and discipline" or is "service discrediting" (the other prong of Article 134 is an assimilated-crimes provision allowing prosecutors to charge violations of federal or state law). This provision of the UCMJ has always been somewhat con-

169. 10 U.S.C. § 891 (2000).
170. *Id.* § 889.
171. *Id.* § 886.
172. *Id.* § 885.
173. *Id.* § 887.
174. *Id.* § 899.
175. Melson, *supra* note 35, at 290–98.
176. 10 U.S.C. § 934.

troversial as applied to members of the armed forces because of concerns regarding vagueness.[177] Nonetheless, it remains an important source of criminal proscription and is routinely used by commanders and their prosecutors, and it is considered constitutional when applied to members of the armed forces.[178]

Extending application of this provision to civilians would, however, trigger substantial due-process concerns. These concerns are more significant in relation to civilian augmentees for a simple reason: They are presumptively not committed to the same disciplinary ethos as their military counterparts. Vagueness concerns regarding members of the armed forces are mitigated because membership in the forces provides individuals sufficient notice of the importance of good order and discipline and the reputation of the armed forces. But the far more tangential relationship between civilian augmentees and the armed forces does not lead to the same degree of de facto notice of the significance of these general interests and the potential consequence for their compromise.

Fundamental due-process concerns are not, however, confined to substantive offenses. Many procedural provisions of the UCMJ now applicable to civilians also seem fundamentally inconsistent with basic notions of civilian criminal law. Three prominent examples include the plenary authority of lay commanders to effectively "indict" defendants, subjecting civilians to what is referred to in military practice as "nonjudicial punishment," and the military-appellate process.

One unique aspect of the military-justice system is the immense power of commanders in the criminal-justice process. The UCMJ empowers these officers to make all critical decisions regarding criminal prosecutions.[179] Although many of these decisions must be preceded by advice from a legal officer,[180] or Judge Advocate, unlike civilian practice it is the layperson, and not the legal officer, who makes the ultimate decision to send a charge to trial. The plenary nature of this power allows commanders to refer (the military analogue to indict) a case to trial even when the pretrial investigation (the military analogue to a grand jury) recommends dismissal of charges.[181] Lay commanders are

177. *See* DAVID A. SCHLUETER, MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE § 2-6, at 105 (6th ed. 2004) ("One of the most controversial 'crimes' in military practice is the deeply rooted general article—Article 134. The article, which like Article 133 [Conduct Unbecoming an Officer and a Gentleman], has been ruled constitutional. . . . [Article 134] makes punishable all of those acts that are not specifically proscribed in the other punitive articles of the U.C.M.J.").

178. *See* Parker v. Levy, 417 U.S. 733, 756–58 (1974); *see also* SCHLUETER, *supra* note 177, § 2-6, at 105.

179. *See* SCHLUETER, *supra* note 177, § 1-8, at 46–49.

180. *See* 10 U.S.C. § 834.

181. 10 U.S.C. § 832(a) ("No charge or specification may be referred to a general court-martial for trial until a thorough and impartial investigation of all the matters set forth therein has been

also empowered to approve or deny pretrial agreements (plea bargains). Perhaps most importantly, lay commanders are empowered to approve or modify the results of military trials.[182] While this power does not extend to making a trial result more severe, no result of trial is "final" until it is approved or modified by the commander who convened the court, vesting the commander with the power to totally set aside a court's finding of guilt, a court's sentence, or both. The extent of this command authority is emphasized explicitly in the Code: "The authority under this section to modify the findings and sentence of a court-martial is a matter of command prerogative involving the sole discretion of the convening authority."[183] Subjecting a civilian to criminal conviction under a process that empowers a lay military commander with such plenary authority is inconsistent with traditional notions of civilian criminal process, and is therefore a serious deprivation of individual rights.

This deprivation is arguably exacerbated by the fact that military courts, unlike their civilian counterparts, are not established under Article III of the Constitution. Instead, UCMJ created these courts under Congress's Article I authority to "make Rules for the Government and Regulation of the land and naval Forces."[184] As a result of this Article I foundation, there has never been a requirement that the military trial or appellate judiciary enjoy life tenure like their Article III counterparts. Instead, these positions are filled by commissioned officers serving as qualified Judge Advocates and assigned to military judiciary duties by their Service Judge Advocate General.[185] This use of Article I courts

made. This investigation shall include inquiry as to the truth of the matter set forth in the charges, consideration of the form of charges, and a recommendation as to the disposition which should be made of the case in the interest of justice and discipline.").

182. *See id.* § 860(c)(1).

183. *Id.*

184. U.S. CONST. art. I, § 8, cl. 14.

185. See 10 U.S.C. § 826, which provides:

> (a) A military judge shall be detailed to each general court-martial. Subject to regulations of the Secretary concerned, a military judge may be detailed to any special court-martial. The Secretary concerned shall prescribe regulations providing for the manner in which military judges are detailed for such courts-martial and for the persons who are authorized to detail military judges for such courts-martial. The military judge shall preside over each open session of the court-martial to which he has been detailed.
>
> (b) A military judge shall be a commissioned officer of the armed forces who is a member of the bar of a Federal court or a member of the bar of the highest court of a State and who is certified to be qualified for duty as a military judge by the Judge Advocate General of the armed force of which such military judge is a member.
>
> (c) The military judge of a general court-martial shall be designated by the Judge Advocate General, or his designee, of the armed force of which the military judge is a member for detail in accordance with regulations prescribed under subsection (a). Unless the court-martial was convened by the President or the Secretary concerned, neither the convening authority nor any member of his staff

presided over by non-life-tenured judges has withstood constitutional scrutiny. In *Weiss v. United States*, the U.S. Supreme Court held that the lack of a fixed term of office for military judges did not violate the Due Process Clause of the Fifth Amendment.[186] But the holding of the Court was influenced substantially both by the express authority vested in Congress by the Constitution to establish such Article I courts for the armed forces and by the history of exercising this authority to establish a military-justice system.[187] This authority to provide for a distinct criminal-justice system for the military led the Court to conclude that it was appropriate to apply a reduced standard of due process.[188] It is questionable, however, whether application of this reduced standard would extend to the use of such tribunals to try civilian augmentees. Accordingly, the Article I-derived military-justice construct that was deemed constitutionally sufficient for members of the armed forces might not pass muster when used to subject civilian augmentees to criminal sanction.

The military appellate process also involves aspects that differ with traditional criminal practice.[189] Like their military trial-judiciary counterparts, military appellate judges are Judge Advocates appointed for a term of years, with no tenure.[190] If the appeal to the Court of Appeals for the Armed Forces is granted or required, civilian judges will decide

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> shall prepare or review any report concerning the effectiveness, fitness, or efficiency of the military judge so detailed, which relates to his performance of duty as a military judge. A commissioned officer who is certified to be qualified for duty as a military judge of a general court-martial may perform such duties only when he is assigned and directly responsible to the Judge Advocate General, or his designee, of the armed force of which the military judge is a member and may perform duties of a judicial or nonjudicial nature other than those relating to his primary duty as a military judge of a general court-martial when such duties are assigned to him by or with the approval of that Judge Advocate General or his designee.
>
> (d) No person is eligible to act as military judge in a case if he is the accuser or a witness for the prosecution or has acted as investigating officer or a counsel in the same case.
>
> (e) The military judge of a court-martial may not consult with the members of the court except in the presence of the accused, trial counsel, and defense counsel, nor may he vote with the members of the court.

See also id. § 866 (providing for the establishment of Military Courts of Review). These courts are also comprised of commissioned officers assigned by their Service Judge Advocate General. According to the Code: "Each Judge Advocate General shall establish a Court of Criminal Appeals which shall be composed of one or more panels, and each such panel shall be composed of not less than three appellate military judges." *Id.* § 866(a).

186. 510 U.S. 163, 165 (1994).

187. *Id.* at 170–75.

188. *Id.* at 177–78.

189. *See* 10 U.S.C. §§ 807(c), 815 (concerning apprehension and commanding officer's nonjudicial punishment).

190. *See* 10 U.S.C. § 866(a); *see also* MANUAL FOR COURTS-MARTIAL, UNITED STATES, R. 1201(b)(1), at II-165 (2005 ed.).

the case. Unlike their Article III counterparts, however, these judges are appointed for a term of years and are not granted life tenure.[191]

Military defendants have periodically challenged this statutory construct which vests lay commanders with immense legal powers. These challenges ultimately culminated in the Supreme Court decision of *Loving v. United States*, which upheld the unique procedures of the military-justice system.[192] *Loving* relied heavily on the special obligation imposed on commanders to maintain good order and discipline in military units.[193] This interest is arguably more attenuated with regard to civilian augmentees. But although the increasing reliance on such civilians by military commanders does implicate this critical justification, the key question is whether it requires a wholesale application of the entire military-justice system to serve this interest.

If no viable alternative existed for addressing serious misconduct by civilian augmentees, this proverbial "baby with the bath water" approach might be justifiable. But the collective impact of subjecting civilian augmentees to the UCMJ when considered within the context of the expansion of federal criminal jurisdiction resulting from the enactment of MEJA and the WCA suggests a negative answer to this question. Instead, wholesale application of the UCMJ to civilian augmentees greatly exceeds the limited purported necessity of providing meaningful disciplinary authority over these civilians. Review of these provisions also suggests that it was unlikely that the full consequence of the amendment was contemplated before its enactment. Although it may be true that the disciplinary necessity regarding civilian augmentees justified full application of the Code in earlier eras, this simply is no longer the case.

As explained earlier in this article,[194] the scope of MEJA and the WCA provide viable criminal alternatives for prosecuting civilians who commit the kinds of offenses that would subject them to federal prosecution in the United States. But these statutes have rarely been used since enactment.[195] This fact has often been asserted as a justification for the

191. *See* 10 U.S.C. § 942.

192. 571 U.S. 748, 773–74 (1996) (upholding the President's authority to prescribe aggravating factors permitting a court-martial to impose the death penalty on an army private who was convicted of murder).

193. *See id.* at 761 ("From the English experience the Framers understood the necessity of balancing efficient military discipline, popular control of a standing army, and the rights of soldiers . . . . The Framers' choice in Clause 14 [of the U.S. Constitution] was to give Congress the same flexibility to exercise or share power as times might demand.").

194. *See supra* notes 116–139 and accompanying text.

195. As of the date of this article, only two indictments have been handed down alleging violation of the MEJA, and none alleging violation of the WCA. *See* sources cited *supra* note 132.

resurrection of military jurisdiction over civilians.[196] In short, military commanders purportedly lament the ineffective implementation of federal criminal statutes and therefore prefer the ability to address misconduct through their own system of justice. Although this preference may be an understandable response to the ineffective implementation of these statutes, it does not justify their disregard when analyzing the necessity to resurrect plenary military jurisdiction over civilians.

Such analysis must presume instead that the chief executive will "faithfully execute" these laws.[197] Two considerations bolster this presumption. First, MEJA has been amended to clarify that it applies to all contractors and subcontractors employed not only by the Department of Defense, but also by any other federal agency providing support to defense missions outside the United States.[198] Thus, there is no room for doubt that this statute provides meaningful criminal proscription for a wide range of criminal offenses committed by virtually any civilian employed by or accompanying the armed forces overseas. Second, although it took nearly five years, in 2005 the Department of Defense published an instruction to implement MEJA.[199] This instruction provides clear and comprehensive guidance to U.S. military commanders on how to process a request for prosecution of a civilian augmentee in federal district court.

Exposing the overly broad scope of jurisdiction resurrected by the amendment to the UCMJ, however, does not mandate the conclusion that civilian augmentees must be immune from all military disciplinary sanction. Such a conclusion would accommodate the interests of civilian augmentees without balancing the interests of military commanders—an interest that as noted above ostensibly motivated the recent UCMJ amendment. What this article proposes therefore is a more carefully tailored balance of these competing interests. This balance takes into consideration the already existing federal criminal jurisdiction over civilian augmentees, as well as the questionable necessity of exposing these civilians to federal criminal conviction for offenses unique to

196. *See, e.g.*, Peters, *supra* note 10, at 385.

197. *See* U.S. CONST. art. II, § 1, cl. 7 ("Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:—'I do solemnly swear (or affirm) that I will *faithfully execute* the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States.'") (emphasis added).

198. *See* 18 U.S.C.A. § 3267(1)(A) (West 2007).

199. *See* INSTRUCTION NO. 5525.11, *supra* note 129, ¶ 1.1. ("Implements policies and procedures, and assigns responsibilities, under the 'Military Extraterritorial Jurisdiction Act of 2000,' as amended by Section 1088 of the 'Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005' . . . for exercising extraterritorial criminal jurisdiction over certain current and former members of the U.S. Armed Forces, and over civilians employed by or accompanying the U.S. Armed Forces outside the United States.").

the military. But the proposed accommodation will also empower military commanders with what is perhaps the most sorely lacking disciplinary authority over civilian augmentees: the authority to impose disciplinary sanctions for nonfelonious yet highly disruptive misconduct.

VI. A Proposal To Reconcile Individual Civilian Rights with Genuine Disciplinary Interests of Military Commanders

Drawing a distinction between criminal and disciplinary sanctions is a concept that military practitioners and commanders understand intuitively. In fact, the vast majority of violations of the UCMJ amount to incidents of minor misconduct, and the vast majority of these incidents are resolved through disciplinary procedures, not through the judicial process of special or general courts-martial.[200] The primary provision of the UCMJ providing for nonjudicial disposition of disciplinary infractions is Article 15.[201] The process provided for by Article 15, and the regulations of the various services implementing this article, are loosely analogous to what civilian practitioners would characterize as pretrial diversion.[202] Article 15 authorizes military commanders to impose "nonjudicial punishment" on members of their units, subject to limitations established both by the Code and by the military regulations, to achieve disciplinary objectives without resorting to judicial process.[203] According to the Army Regulation establishing procedures for nonjudicial punishment:

> Use of nonjudicial punishment is proper in all cases involving minor offenses in which nonpunitive measures are considered inadequate or inappropriate. If it is clear that nonjudicial punishment will not be sufficient to meet the ends of justice, more stringent measures must be taken. Prompt action is essential for nonjudicial punishment to have the proper corrective effect. Nonjudicial punishment may be imposed to—
>
> a. Correct, educate, and reform offenders who the imposing commander determines cannot benefit from less stringent measures.

200. James B. Roan & Cynthia Buxton, *The American Military Justice System in the New Millennium*, 52 A.F. L. Rev. 185, 193 (2002).

201. 10 U.S.C. § 815 (2000).

202. *See* Schlueter, *supra* note 177, § 1-8(C), at 47. According to Schlueter: "Nonjudicial punishment, widely used in all of the services, is specifically addressed in Article 15 of the U.C.M.J. and is designed to allow a commander to quickly impose minor punishments for minor offenses committed by members of his command." *Id.*

203. *See id.* § 3-1, at 146; *see also* U.S. Dep't of the Army, Military Justice: Army Regulation 27–10, ¶ 3-2, at 3 (2005), *available at* http://www.army.mil/usapa/epubs/pdf/r27_10.pdf [hereinafter Army Regulation 27–10].

b. Preserve a Soldier's record of service from unnecessary stigma by record of court-martial conviction.

c. Further military efficiency by disposing of minor offenses in a manner requiring less time and personnel than trial by court-martial.[204]

As a general rule, a commander initiates this disciplinary proceeding, and subsequently hears evidence, makes findings of guilt, and decides on an appropriate sentence. Under military regulations appeal is authorized to the next level of command.[205] Although some military regulations impose legal-review requirements for certain aspects of the process, the process is quasi-adversarial in nature and the accused is not entitled to legal representation during the proceedings.[206] Nonetheless, the accused is entitled to one very important right: the right to object to nonjudicial resolution of an allegation by demanding trial by court-martial. With rare exception, such a demand terminates the nonjudicial disciplinary proceeding.[207]

If an accused service member has an almost absolute right to demand trial by court-martial, why would so many allegations of misconduct be resolved through this nonjudicial process? The answer lies in the benefit that accrues to the accused by accepting this process. Unlike a court-martial, a finding of guilt in a nonjudicial proceeding under Article 15 does not result in a federal criminal conviction.[208] Accordingly, the service member is protected from the permanent

204. ARMY REGULATION 27–10, *supra* note 203, ¶ 3-2, at 3.

205. *Id.* ¶ 3-30, at 15.

206. *See id.* ¶ 3-2, at 3; see also *id.* ¶ 3-7, at 5, regarding who may impose nonjudicial punishment:

> *a. Commanders.* Unless otherwise specified in this regulation or if authority to impose nonjudicial punishment has been limited or withheld by a superior commander . . . any commander is authorized to exercise the disciplinary powers conferred by Article 15.
>
> (1) The term commander, as used in this chapter, means a commissioned or warrant officer who, by virtue of that officer's grade and assignment, exercises primary command authority over a military organization or prescribed territorial area, that under pertinent official directives is recognized as a command.

In regard to the right to counsel, the Regulation provides:

> The Soldier will be informed of the right to *consult* with counsel and the location of counsel. For the purpose of this chapter, counsel means the following: A judge advocate (JA), a Department of Army (DA) civilian attorney, or an officer who is a member of the bar of a Federal court or of the highest court of a State, provided that counsel within the last two categories are acting under the supervision of either USATDS or a staff or command judge advocate.

Id. ¶ 3-18, at 9 (emphasis added).

207. *See* 10 U.S.C. § 815(a) (2000). The one exception to this right to demand trial by court-martial and terminate nonjudicial-punishment proceedings is "except in the case of a member attached to or embarked in a vessel." *Id.*

208. *Id.* § 815.

stigma of a federal record. Perhaps more importantly for many service members facing the choice of whether to accept nonjudicial proceedings, the punishment permissible under Article 15 is limited to what is best characterized as disciplinary sanctions. These typically include forfeiture of pay for a limited period, loss of rank, restriction, and extra duty. Permissible punishments vary depending on the level of the commander imposing the nonjudicial punishment and the rank of the service member.[209] But under no circumstances may the punishment include a punitive discharge from the military (or any discharge for that matter) or incarceration at a military correctional facility—punishments that are almost always authorized after conviction by a military criminal court. Accordingly, a service member is able to shield the extent of punitive exposure by bargaining away his or her absolute right to trial by court-martial; and a commander is able to ensure swift disciplinary process by bargaining away his or her right to initiate criminal proceedings in response to misconduct.[210]

Because the recent amendment to the UCMJ subjects civilian augmentees to the entire Code, these civilians are now subject to Article 15. Subjecting a civilian to this nonjudicial process might be perceived by some to only further exacerbate the deprivation of fundamental rights accorded to criminal defendants. But the process established by Article 15 might actually offer insight into an ideal accommodation of competing interests relating to civilian misconduct.

As discussed previously in this article, exposing civilians to court-martial jurisdiction raises two troubling concerns. The first of these is whether the deprivation of fundamental trial rights inherent in such exposure is constitutionally permissible. The second is whether, even assuming such a deprivation is justifiable in the abstract, the enactment of federal criminal statutes that address a wide array of civilian misconduct tilts the constitutionality balance against court-martial jurisdiction. Neither *Reid* nor the legislative history of MEJA or the WCA provides dispositive authority to resolve these concerns. But the trepidation with which the military services have received the recent amendment suggests that these authorities might not be considered to provide dispositive support for the amendment.

But if the enactment of MEJA and the WCA are considered to alter the balance of constitutional analysis—as is proposed in this article—this alteration must be limited to criminal sanction. Nothing in these federal statutes empowers military commanders to impose the type of

209. *Id.* § 815(b).

210. Nonjudicial punishment is used primarily to respond to minor offenses unique to the military. *See id.* §§ 877–934; *see also* ARMY REGULATION 27–10, *supra* note 203, ¶ 3-9, at 6.

disciplinary sanctions normally accomplished through nonjudicial punishment and so critically important in maintaining good order and discipline. What is needed, therefore, is not necessarily an amendment to the Code subjecting civilian augmentees to the full corpus of the UCMJ. Rather, military commanders must be empowered to respond to acts of misconduct by civilian augmentees that endanger the maintenance of good order and discipline in the unit and are not otherwise subject to the jurisdiction established by federal criminal statutes. Civilians should also be protected, however, from the permanent stigma of a federal criminal conviction absent the safeguards afforded by the Bill of Rights. In addition, civilian augmentees should be afforded sufficient process to provide safeguards against abuse of power by the military commanders they support. The mechanism with which to accomplish these objectives lies within the Code itself—in the form of what is known as the summary court-martial.

Summary courts-martial are perhaps best understood as a hybrid between nonjudicial punishment and formal criminal proceedings.[211] Like nonjudicial punishment, individuals may be charged with any noncapital offense codified in the punitive articles of the Code. And like Article 15, conviction by a summary court does not result in a federal criminal record. Unlike nonjudicial punishment, however, the summary court is composed of a commissioned officer who is not the unit commander, providing for division between the officer normally making the allegation and the officer adjudicating the case.[212] In addition, the summary court is governed by the military rules of evidence, and although there is no right to representation before such a court, it is more adversarial in nature than nonjudicial-punishment proceedings.[213]

There are two additional important similarities between the summary court and nonjudicial punishment: First, individuals brought before a summary court have an absolute right to object to the jurisdiction of the court.[214] Like nonjudicial punishment, such objection exposes the

211. *See* MANUAL FOR COURTS-MARTIAL, *supra* note 190, R. 1301(a), at II-175; SCHLUETER, *supra* note 177, § 1-8(D)(1), at 47. According to Schlueter:

> A summary court-martial, designed to dispose of minor offenses in a simplified proceeding, consists of one commissioned officer who may, but need not be, a lawyer. The accused, whose consent is a prerequisite to the proceeding, is normally not entitled to a detailed lawyer, but upon request may be represented by a civilian counsel, at no expense to the government, or by an individually requested military counsel.

Id. (citations omitted).

212. *See* SCHLUETER, *supra* note 177, § 15-26(A), at 894.

213. *See id.* § 15-26(C), at 895.

214. *See* 10 U.S.C. § 820 (2000) ("No person with respect to whom summary courts-martial have jurisdiction may be brought to trial before a summary court-martial if he objects thereto.").

individual to trial by a true criminal court—a special or general court-martial—both of which are empowered to impose more severe penalties, in addition to a federal criminal conviction. The second similarity is that the summary court may impose only limited punishment. Like nonjudicial punishment, the permissible punishments available for a summary court vary depending on the rank of the accused. As a general rule, however, these are similar to the disciplinary-type punishments authorized under Article 15.

This limited-punishment jurisdiction, requiring trial by an officer who is not the accuser and eliminating the risk of federal criminal record, is the type of disciplinary tool that could be used to reconcile the competing interests related to civilian misconduct. Subjecting civilians to summary-court jurisdiction would of course deprive them of a number of fundamental constitutional trial rights. But the consequence of that deprivation would be far less profound than subjecting them to trial by special or general courts-martial with the power to impose more severe punishments and stigmatize the civilian with a permanent criminal record. From the military commander's perspective, such jurisdiction would allow for the efficient imposition of disciplinary-type sanctions for acts of misconduct that threaten the good order and discipline of the military unit. Perhaps more importantly, civilians suspected of committing acts of serious criminal misconduct not appropriately subject to disciplinary sanctions would, instead of being subjected to trial by court-martial, be referred to a U.S. Attorney for trial in federal court pursuant to MEJA or the WCA.

Such a proposal might appear radical. Subjecting civilians to a disciplinary system with limited individual-trial rights might seem antithetical to the protection from arbitrary government condemnation that the Bill of Rights provides for every citizen. But it is essential to assess any proposed extension of military jurisdiction over civilian augmentees from the realistic perspective that the individual's interest be balanced against the military interest. This balancing has always been the sine qua non of allowing the application of military jurisdiction over civilians, a justification that survived even the *Averette* decision (provided the requisite declaration of war is enacted by Congress). This proposal acknowledges this historical interest, provides a meaningful military disciplinary tool over civilian augmentees within the broader context of existing federal criminal jurisdiction, and protects these civilians from any long-term stigmatization resulting from this such sanction.

Implementing such a proposal would require a more complex amendment to the Code than that recently enacted. This amendment

would retain the currently enacted language of Article 2(10), but add the following qualification:

> Paragraph (10) of section 802(a) of title 10, United States Code (article 2(a) of the Uniform Code of Military Justice), is amended by striking ''war'' and inserting ''declared war or a contingency operation''. *However, the jurisdiction established by this Article may be exercised only by a summary court-martial following the procedures established in section 820 of this Code.*

Section 820 establishes the jurisdiction of summary courts-martial. This Article currently provides:

> Subject to section 817 of this title (article 17), summary courts-martial have jurisdiction to try persons subject to this chapter, except officers, cadets, aviation cadets, and midshipmen, for any noncapital offense made punishable by this chapter. No person with respect to whom summary courts-martial have jurisdiction may be brought to trial before a summary court-martial if he objects thereto. If objection to trial by summary court- martial is made by an accused, trial may be ordered by special or general court-martial as may be appropriate. Summary courts-martial may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by this chapter except death, dismissal, dishonorable or bad- conduct discharge, confinement for more than one month, hard-labor without confinement for more than 45 days, restrictions to specified limits for more than two months, or forfeiture of more than two-thirds of one month's pay.[215]

To provide for the jurisdiction over civilian augmentees proposed in this article, the following subparagraph could be adopted to supplement Article 20:

> Civilians subject to the jurisdiction of summary courts-martial by operation of Article 2(10) of this Code may object to trial by summary court-martial only when the charged offense may be charged as a violation of other federal criminal statutes. In all other cases summary court-martial jurisdiction is binding, but only field grade judge advocate may serve as the summary court. Upon conviction by summary court-martial, the court may impose punishment in the form of an order of termination from employment; or restrictions to specified limits for up to one month and/or a fine of two-thirds of one month's pay.

This is, of course, just one proposal for extending the limited jurisdiction of summary courts-martial to civilian augmentees. Other options might include requiring the court to be composed of one field-grade officer and one civilian from the supervisory chain of the accused; mak-

215. *Id.*

ing summary courts-martial jurisdiction binding in all cases; allowing the accused to object to trial by summary court-martial in all cases but only if the accused consents to trial by general court-martial for offenses not falling within the jurisdiction of a federal district court; and the authorization of other types or combinations of punishments, such as a fine and restriction to be followed by termination of employment. Any of these alternates shares a common benefit for the civilian accused of misconduct by a military commander: preservation of the absolute right to minimize the consequence of such an allegation to adjudication not considered "criminal" in the civilian context.

It is this mitigation of the detrimental consequence flowing from court-martial conviction—namely a permanent criminal record and deprivation of liberty—that is so significant for purposes of walking the proverbial tightrope between the concerns reflected in *Reid* and the genuine interests of military commanders. Neither of these considerations should be permitted to consume the other. Instead, a balanced approach to addressing the current disciplinary gap is a more palatable solution than the all-or-nothing options reflected in the pre- and post-amendment jurisdictional paradigm. Limiting the jurisdiction over civilians to summary courts-martial offers the unique benefit of empowering commanders to respond to a wide range of potential misconduct while protecting the fundamental rights of these civilians. It also ensures an appropriate division of authority between the commander, who will almost always serve as the individual initiating the disciplinary process, and the officer responsible for adjudicating an allegation—a benefit not likely if civilians are subject to Article 15 of the Code.

Many of these advantages could also be achieved by subjecting civilian augmentees to Article 15. However, the summary-court proposal is also preferable to subjecting civilian augmentees to Article 15 for other reasons. It ensures that a civilian accused of misconduct will have the benefit of legal advice from a qualified Judge Advocate; the most basic due-process rights of notice and an opportunity to be heard; and the ability to rely on the Rules for Courts-Martial to obtain evidence, question witnesses, and object to inadmissible evidence.[216] In addition, any finding of guilt by a summary court will be subject to subsequent review by a qualified Judge Advocate.[217] Finally, the proposed amendments to the UCMJ will strike an effective accommodation between military and civilian jurisdiction by ensuring that a civilian accused of an offense that is also a violation of existing federal criminal law is able to

216. *See* ARMY REGULATION 27–10, *supra* note 203, ¶ 5-23–28, at 34–35.

217. 10 U.S.C. § 864.

object to military-noncriminal jurisdiction and demand trial in federal court.

VII. CONCLUSION

The recent amendment to the UCMJ resurrecting military criminal jurisdiction over civilians accompanying the force was unquestionably unexpected. But it was also unquestionably responsive to the perception that the lack of meaningful military disciplinary authority over these evermore-omnipresent civilians is having a detrimental impact on the good order and discipline of deployed armed forces. This perception is certainly not without merit, as cases of civilian-augmentee misconduct become increasingly more common with the accordant increase in the number of such civilians in areas of current military operations.

Unfortunately, simply amending Article 2(10) of the UCMJ is insufficient to conclusively resolve this jurisdictional gap. There remains a substantial question whether subjecting civilians to military jurisdiction—even those civilians accompanying the force in the field—will withstand constitutional scrutiny. Resurrecting such jurisdiction after almost three decades of dormancy during which time nothing in the nature of military procedure changed to rectify the flaws identified by the *Reid* Court only exacerbates this uncertainty.

Nor is the analysis of this amendment to the Code limited to considering the factors analyzed in *Reid.* The enactment of federal criminal statutes specifically intended to address misconduct committed by civilians accompanying the force has altered the analytical landscape. Although the legislative history of these statutes indicates that they were not intended to displace existing military jurisdiction, it is simply disingenuous to suggest that they were not intended to fill this jurisdictional gap. Accordingly, unlike the jurisdictional landscape that existed at the time of the *Reid* decision, today military commanders have the ability to refer acts of criminal misconduct committed by civilian augmentees to U.S. Attorneys for prosecution. That the executive branch has not effectively implemented these statutes in no way justifies dismissing them as factors of analysis. Instead, these statutes should be considered as, at least, partially filling the jurisdictional gap created in 1970 by the *Averette* decision.

These statutes have not, however, provided a sufficiently comprehensive framework to address civilian-augmentee misconduct. Even if effectively implemented, they failed to provide military commanders with the means to impose disciplinary type sanctions on civilian augmentees—the type of sanctions so critical to the maintenance of good order and discipline within a military unit. Such sanctions are routinely

imposed on military members of deployed units through the nonjudicial procedures of Article 15 of the Code. However, subjecting civilian augmentees to Article 15 would only exacerbate the amendment's questionable constitutionality.[218] Nonetheless, the basic premise of Article 15—the ability to impose nonjudicial-disciplinary sanctions for minor misconduct without the stigmatization of a criminal conviction—is a more legitimate military interest than application of the entire UCMJ to civilians. A method of implementing Article 15's underlying premise while at the same time ensuring procedures provide more meaningful protection for civilian augmentees is therefore needed.

The UCMJ provides the means to accomplish the balance between military interest and civilian rights in the form of the summary court-martial. On examination of summary-court procedure, it becomes clear that these courts are in fact better understood as another nonjudicial disciplinary forum with important additional procedural safeguards.[219] Most significant among these is the requirement that the court be composed of an officer independent from the commander initiating disciplinary proceedings. There is, of course, no question that prosecution before such a court fails to afford a number of criminal trial rights held to be fundamental by the Supreme Court. But the consequence of this deprivation of rights is substantially mitigated by the fact that findings of guilt by such a court do not result in a federal criminal conviction. Accordingly, summary courts are best understood as disciplinary and not criminal tribunals, a critical consideration when assessing the constitutionality of subjecting civilians to military jurisdiction.

Limiting military jurisdiction over civilians to summary courts-martial will require several additional amendments to the UCMJ. These would include qualifying the resurrection of jurisdiction resulting from the amendment to Article 2(10); providing for the circumstances that permit a civilian to object to the jurisdiction of these courts and demand trial by federal court; and providing for available punishments uniquely tailored to civilian augmentees. But there is no reason why such amendments could not be enacted, particularly considering the fact that the recent amendment reflects a clear desire to enhance the power of military commanders to deal with civilian misconduct. This more limited exposure to military jurisdiction would go far toward accomplishing this goal while reducing the risk of judicial invalidation. This in turn might produce a more enthusiastic response by the armed forces to implement

218. Becker, *supra* note 12, at 590–91 (quoting Neil K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259, 1277 (2002)).

219. *See* Michael H. Gilbert, *Summary Courts-martial: Rediscovering the Spumoni of Military Justice*, 39 A.F. L. REV. 119, 120 (1996).

such amendments, which will ultimately be essential for the effective implementation of any effort to establish more effective discipline over civilians accompanying the force.

PREPARED STATEMENT OF MICHAEL J. EDNEY

Statement of Michael J. Edney
Gibson, Dunn & Crutcher LLP

Prepared Testimony Before
The Senate Committee on the Judiciary

For a Hearing Entitled

"Holding Criminals Accountable:
Extending Criminal Jurisdiction to Government Contractors and Employees Abroad"

May 25, 2011

Chairman Leahy, Ranking Member Grassley, and distinguished members of the Committee, thank you for giving me the opportunity to testify on this important subject.[1] The United States is conducting military operations in two foreign theaters of combat and maintains diplomatic outposts throughout the world. Holding accountable representatives of the United States—whether its employees or its contractors—who engage in serious misconduct abroad is thus a recurring and complex matter. Current federal law arguably does not provide authority to prosecute some notable incidents of potential misconduct overseas by contractors or employees unassociated with the Department of Defense. The Congress and the Executive Branch have struggled with the appropriate legislative approach to this dilemma through at least two Administrations.

Addressing this problem, however, requires exceptional caution and attention to detail to protect ongoing and future intelligence and other national security operations. Legislation that extends outside the United States a wide range of federal criminal laws to employees and

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[1] The views expressed herein are my own and do not reflect those of Gibson, Dunn & Crutcher LLP.

contractors *of all federal government agencies*, including our intelligence agencies, without careful review and appropriate exceptions, would present a particular risk to national security.

I. Current Law and Foreign Policy Challenges

Current law provides mechanisms for punishing misconduct by certain U.S. government employees and contractors that occurs outside the United States. The Uniform Code of Military Justice ("UCMJ") establishes prohibitions and obligations that apply outside the United States,[2] the violation of which can result in sanctions similar to the criminal justice system.[3] These regulations were crafted with the realities of foreign armed conflict in mind. The UCMJ applies not only to members of the active and reserve units of our armed forces, but also to persons (such as contractors and civilian employees) who serve with or accompany our armed forces overseas.[4]

In 2000, the Congress passed and the President signed the Military Extraterritorial Jurisdiction Act ("MEJA").[5] That Act, as amended in 2004, applies a discrete set of federal criminal felonies overseas to members of the military and certain individuals who support or accompany the armed forces.[6] Conducting military operations under multiple and newly applicable federal criminal prohibitions ordinarily would present challenges. But MEJA sought

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[2] 10 U.S.C. §§ 805, 877–934.

[3] 10 U.S.C. §§ 855–858b.

[4] 10 U.S.C. § 802(a).

[5] Pub. L. No. 106-523, 114 Stat. 2488 (2000) (codified at 18 U.S.C. §§ 3261 *et seq.*).

[6] 18 U.S.C. § 3261(a).

to avoid these difficulties by ensuring the primacy, in most circumstances, of the UCMJ and its long history of regulating the conduct of armed conflicts.[7]

These two laws, however, stop short of U.S. government employees and contractors not closely associated with the Department of Defense. For example, our diplomats abroad or the security personnel who support the Department of State would not automatically fall under MEJA or the UCMJ.[8]

This condition can raise foreign policy challenges, particularly in foreign countries where U.S. troops are deployed for combat operations. Those operations are often conducted under a status of forces agreement concluded with the governments of those countries, should a recognized government exist. In those agreements, the United States customarily seeks immunity for all of its employees and contractors—whether associated with the military or not—from the criminal procedures of the foreign state. This immunity is important, as the nature of combat operations can inflame passions that may lead to foreign government prosecutions unwarranted by the evidence. One argument the United States makes in negotiations for this immunity is the existence of mechanisms for the United States to address the misconduct of our own troops, employees, and contractors. This argument can be unpersuasive, however, when relevant law does not reach certain notable groups of U.S. government employees and contractors in the theater. The United States faced this challenge in negotiating the 2008 status

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[7] 18 U.S.C. § 3261(d).

[8] *See* 18 U.S.C. §§ 3261(a), 3267(1)–(2); 10 U.S.C. § 802(a).

of forces agreement with the Government of Iraq and ultimately accepted a narrowed immunity for its employees and contractors from the Iraqi criminal justice system.[9]

II. Previous Efforts To Extend Federal Criminal Law Overseas to U.S. Government Employees and Contractors Unassociated with the Department of Defense

Several Congressmen and Senators introduced versions of legislation in the 110th Congress seeking to apply certain federal criminal laws overseas to a wider set of U.S. government employees and contractors. A form of such legislation advanced furthest in the House of Representatives—H.R. 2740, entitled the "MEJA Expansion and Enforcement Act."[10] That bill sought to expand MEJA to employees and contractors *of any U.S. government agency* acting in an area, such as Iraq or Afghanistan, where the U.S. military is "conducting a contingency operation."[11] The bill tracked MEJA in the substantive scope of applicable offenses, seeking to criminalize conduct that would have been a federal felony "if the conduct had been engaged in within the special maritime and territorial jurisdiction of the United States."[12]

The Administration of President George W. Bush raised serious concerns about this bill. A Statement of Administration Policy issued on October 3, 2007, explained that "[t]he bill would have unintended and intolerable consequences for crucial and necessary national security

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[9] *Compare* Coalition Provisional Authority Order Number 17 (June 27, 2004), *with* Agreement Between the United States of America and the Republic of Iraq on Withdrawal of United States Forces from Iraq and the Organization of Their Activities During Their Temporary Presence in Iraq (Nov. 17, 2008).

[10] H.R. 2740, 110th Cong. (2007) (as introduced in House, June 15, 2007).

[11] *Id.* § 2(a)(1).

[12] 18 U.S.C. § 3261(a); *see* H.R. 2740, *supra* note 10, § 2(a)(1).

activities and operations."[13] Recognizing this dilemma, the version of H.R. 2740 ultimately passed by the House of Representatives included an attempt to carve from its coverage intelligence operations.[14] The Administration and Senate staff subsequently discussed potential text for a carve-out or exception to protect national security and intelligence operations. Never reaching agreement, the 110th Congress adjourned without presenting to the President legislation on this subject.

III. Unless Carefully Drafted, Expanding Federal Criminal Law to the Employees and Contractors of All U.S. Government Agencies Will Threaten Important National Security and Intelligence Operations

Any legislative measure to expand federal criminal law abroad to all government employees and contractors must carefully address the effect on national security operations.

I have reviewed S. 2979, entitled the "Civilian Extraterritorial Jurisdiction Act of 2010." It contains many of the same concerning features as H.R. 2740 introduced in the 110th Congress. Certainly, S. 2979 would authorize the prosecution of future misconduct by, for example, private security contractors protecting State Department diplomats in Iraq. At the same time, however, S. 2979 would apply wide swaths of federal criminal law to employees and contractors of our intelligence agencies and would revolutionize the carefully drawn set of legal restrictions that governs the activities of those agencies. This was the same problem presented by early drafts of H.R. 2740 in the 110th Congress. Importantly, S. 2979 lacks an exception for or any method of

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[13] Statement of Administration Policy: H.R. 2740—MEJA Expansion and Enforcement Act of 2007, American Presidency Project (Oct. 3, 2007), *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=75852#ixzz1NBl5xagQ (last visited on May 24, 2011).

[14] H.R. 2740, 110th Cong. § 6 (2007) (as passed by House, Oct. 4, 2007).

protecting crucial intelligence and national security operations from prosecution.[15] Three points are important here.

First, in part because of the effect on overseas national security or intelligence operations, the Congress has been careful explicitly to apply only a very limited set of criminal offenses to conduct occurring wholly outside the territory of the United States. The limited set of offenses with relevant extraterritorial effect include the anti-torture statute,[16] the War Crimes Act,[17] certain anti-human trafficking statutes,[18] the treason statute,[19] and the anti-genocide statute.[20]

The Congress should continue its practice of giving wholly extraterritorial effect to criminal statutes only after careful and informed study of their effects on national security and intelligence operations. Most notably in this regard, legislation proposed to cover all U.S. government employees and contractors, including those of our intelligence agencies, has tended to incorporate laws enacted to govern the Special Maritime and Territorial Jurisdiction of the

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[15] In addition, the geographic scope of the threat to intelligence operations presented by S. 2979 is broader because it would apply *worldwide*. H.R. 2740, by contrast, would have applied only in and around areas of a U.S. military contingency operation, such as Iraq and Afghanistan.

[16] 18 U.S.C. § 2340A.

[17] 18 U.S.C. § 2441.

[18] 18 U.S.C. §§ 3271-72.

[19] 18 U.S.C. § 2381.

[20] 18 U.S.C. § 1091.

United States ("SMTJ").[21] The SMTJ includes areas where the federal Government would perform the functions of a primary sovereign, without the assistance of a State government, such as foreign military bases and embassies or aboard U.S. registered vessels. Federal criminal offenses for the SMTJ supply the type of public order crimes that residents of a city in the United States would expect their State and local governments to enact, including prohibitions on burglary, robbery, manslaughter, and assault.[22]

The inclusion of SMTJ offenses is particularly significant given the novelty of their application to intelligence operations. The current law of the Military Extraterritorial Jurisdiction Act, at first glance, also applies SMTJ offenses to members of the military while outside the United States.[23] But MEJA protects our armed forces when conducting military operations abroad by not displacing or supplementing the UCMJ, with limited exceptions.[24] The UCMJ has a long tradition of responsibly governing what can be violent military activities, and our armed forces can take comfort that the UCMJ ordinarily will not punish them for doing their jobs. Also when applied in areas of exclusive federal jurisdiction, SMTJ crimes as customary public order offenses draw on extensive bodies of law protecting activities similar to those of domestic law enforcement. But there is no such custom protecting intelligence activities abroad from general public order offenses, because they have never applied outside the United States.

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[21] 18 U.S.C. § 7.

[22] 18 U.S.C. §§ 2111, 1112, 113.

[23] 18 U.S.C. § 3261(a).

[24] 18 U.S.C. § 3261(d).

Legislation extending SMTJ offenses to all government employees throughout the world thus places intelligence activities at particular risk.

It is difficult to address in an open hearing how these offenses, if applicable to all federal government employees and contractors while outside the United States, might affect intelligence or other national security operations. For purposes of this setting, I strongly agree with Assistant Attorney General Breuer that the Congress should explicitly except national security and intelligence activities from the contemplated expansion of criminal law abroad. Legislation with an appropriately strong exception would prevent interference with vital national security and intelligence operations, while authorizing future prosecutions, if appropriate, in circumstances similar to recent difficult cases. Alleged grave misconduct by diplomatic security personnel, and civilian employees and contractors' outrageous and embarrassing offenses against the civilians of foreign countries, often committed on personal time while stationed abroad, come to mind. Any restrictions on intelligence activities should not be a byproduct of addressing an unrelated problem.

At a minimum, any legislative effort in this area that lacks a broad national security exception must not proceed without a fully informed evaluation of how various criminal laws, never before applied abroad, would affect current and potential national security and intelligence operations. In such circumstances, committees of the Congress should hold closed hearings where they can address these issues with the benefit of classified information. The congressional intelligence committees, given their regular responsibility in setting rules for the conduct of intelligence operations and overseeing their execution, should have an important role in any such inquiry.

Second, the prospect of prosecutorial discretion would not solve the national security threat identified above. Some might say that the Department of Justice would not prosecute intelligence officers for carrying out authorized overseas operations, even if those officers transgressed one of the criminal statutes the proposed legislation would make applicable. In my experience, however, intelligence officers and their supervisors are generally unwilling to undertake an operation if a U.S. criminal statute potentially prohibits it. Nor should they be expected to rely for their continued liberty on the exercise of prosecutorial discretion after the fact. Without protection in statute, broad expansions of criminal laws abroad, leaving unanswered questions, may chill vital national security and intelligence activities.

Third, if legislation were to apply a wide selection of criminal offenses to intelligence and other national security activities, we should expect further strain on the Classified Information Procedures Act ("CIPA").[25] Several members of this Committee have noted the need for CIPA reform.[26] CIPA was enacted in 1980 to combat the threat of graymail in espionage prosecutions.[27] To that end, CIPA established elaborate, information-forcing procedures that require defendants to give notice before disclosing any classified information in open court.[28] As this Committee made clear when considering CIPA, the principal purpose of these procedures was to make manageable cases against U.S. government employees who

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[25] 18 U.S.C. app. 3 §§ 1–16.

[26] *See, e.g.*, Classified Information Procedures Reform Act, S. 1726, 111th Cong. §§ 201-05 (2009) (introduced by Sens. Kyl and Cornyn, Sept. 29, 2009).

[27] S. Rep. No. 96-456, *Classified Information Procedures Act* (June 18, 1980), *reprinted in* 1980 U.S.C.C.A.N. 4294, 4295.

[28] 18 U.S.C. §§ 2, 5–9.

possess classified information independently of anything that occurs in the criminal prosecution.[29]

Enforcement of a broad new set of criminal statutes against intelligence or national security operations abroad would be another application beyond the specific circumstance that prompted CIPA in 1980. The expansion of federal criminal law contemplated by the proposed legislation cannot be considered in isolation from efforts to update CIPA for the last three decades of new challenges.

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Thank you again for the opportunity to discuss this important issue with the Committee. I am prepared to answer the Committee's questions.

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[29] The Judiciary Committee's report of the bill explained the extensive study of "cases in which intelligence information had been passed to foreign powers through espionage or through leaks in the media." S. Rep. No. 96-456, *supra*, at 4295. The key finding of the Committee's study was that "prosecution of a defendant for disclosing national security information often requires the disclosure in the course of trial of the very information that the law seeks to protect." *Id.*

PREPARED STATEMENT OF TARA LEE

STATEMENT OF
TARA LEE
GLOBAL CO-CHAIR, TRANSNATIONAL LITIGATION
DLA PIPER LLP (US)

BEFORE THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

HEARING ON
"HOLDING CRIMINALS ACCOUNTABLE: EXTENDING CRIMINAL JURISDICTION TO GOVERNMENT CONTRACTORS AND EMPLOYEES ABROAD"

MAY 25, 2011

Mr. Chairman, Senator Grassley, and other distinguished members of the Committee, thank you for the opportunity to appear before you today. I know that each of you share the deep respect and appreciation that I feel for the men and women of the defense contracting community, especially for those individuals who endure arduous conditions and unstable environments so that they can serve alongside and support the armed forces. I want to thank you for the opportunity to address you today and to thank you for the work you have undertaken on behalf of veterans, military members and their families, and contractors. As someone who has served in the Navy, been the spouse of an Army soldier, and is now a member of the contracting community, I want to thank you on behalf of each of those communities for what you do for us.

The issue today – extraterritorial jurisdiction and accountability for contractors – does not engender a great deal of controversy or dissent. It is not, and should not be, a partisan matter. Nether is it an issue where the U.S. judicial system and the contracting community are at odds. We all share a commitment to serving the national security objectives of the United

States of America. I think we also share a desire for there to be clarity in the accountability mechanisms that reach our citizens. When the accountability mechanism is focused on those individuals who serve in harm's way on our behalf, whether they be uniformed or not, the obligation to provide them with clarity is especially strong.

I am a Naval Academy graduate, a former military lawyer, and a former fellow at the Center for the Study of Professional Military Ethics at the U.S. Naval Academy, where I studied and taught battlefield accountability. In my current practice I both advise companies on mitigating their risks and training their employees to operate in conflict environments, and represent companies when they face government investigations and civil or criminal litigation. I have also devoted several thousand hours of pro bono legal work to the representation of victims of the horrific war crimes that occurred in Somalia in the 1980's, victims who, because no jurisdiction had the capacity or will to take criminal action, had no hope of achieving redress other than through the civil courts of the United States. These experiences each contribute to my very broad perspective on the importance of clarity in criminal accountability mechanisms.

From my experience – and I speak today from the perspective of an attorney who currently manages a law practice group specializing in representing government contractors – the Military Extraterritorial Jurisdiction Act standing alone has not provided that clarity. As you know, the Act has been subject to legal challenge as to the breadth of its jurisdiction, as it applies on its face only to those contractors who are "employed by or accompanying the Armed Forces outside the United States." Arguably, MEJA by its plain text does not apply to

those contractors working for the State Department or for government agencies other than the Department of Defense.

Clarity and certainty is as important to the contracting community as it is to the government. Companies have an obligation to their employees to properly advise them of the legal rights, risks, and accountability mechanisms to which they are subject when serving overseas. A continued absence of clarity on whether MEJA applies to civilian employees working on non-DoD contracts does not serve the interests of the contracting community or its employees. For example, a company with both Department of Defense and Department of State contracts might, under the current statutory framework, accurately advise employees working on its Defense contracts that they "are" subject to MEJA jurisdiction, while advising employees doing similar work in the same location but on a State Department contract that they "might be" subject to MEJA jurisdiction. Neither the statute itself nor the limited number of available judicial interpretations make the effective reach of MEJA completely clear. Thus the Civilian Extraterritorial Jurisdiction Act has the potential to provide more certainty regarding the application of U.S. criminal law to overseas contractors.

Not only would CEJA provide more jurisdictional certainty, it would also enable the prompt and professional investigation of potentially criminal incidents. Civilian companies, especially those operating under the often arduous conditions of contingency operations, are neither empowered to perform nor well-suited to perform the sovereign functions of law enforcement and criminal investigation. Moreover, contractors often operate in unstable environments where the host nation capacities for criminal justice functions are limited or developing. Companies operating in those environments are much better served if adequate

U.S. government resources are available to assist with or to provide the function. CEJA also provides the personnel and resources to address that need.

I know you have received written statements of support from several companies directly and from the International Stability Operations Association, a trade organization representing stability operations contractors, as well as from organizations in the human rights community. The Commission for Wartime Contracting also recently called for clarification in criminal jurisdiction over civilian-agency contractors. This diverse recognition of the need for an appropriately crafted CEJA reflects, I think, the universal recognition that accountability for criminal wrongdoers is a critical component of securing our nation's foreign policy goals. No-one wants to operate in an environment of uncertain legal clarity, least of all companies who are already operating in often unstable environments.

Thank you again for the opportunity to discuss this important topic with you today and I look forward to answering any questions you might have.

PREPARED STATEMENT OF CHAIRMAN PATRICK J. LEAHY

Statement Of Senator Patrick Leahy (D-Vt.),
Chairman, Senate Judiciary Committee,
Hearing On "Holding Criminals Accountable: Extending Criminal Jurisdiction To Government Contractors And Employees Abroad"
May 25, 2011

Today, the Committee considers the need to ensure accountability for crimes committed by Government contractors and employees abroad. President Obama has been working hard to improve America's credibility in the world, our reputation for justice, and our commitment to the rule of law. A key component of that important mission is ensuring accountability for those who represent us overseas. Accountability is crucial, not just for our image abroad and our diplomatic relations, but for ensuring our national security.

To promote accountability, Congress must make sure that our criminal laws reach serious misconduct by American Government employees and contractors wherever they act. That is why I introduced the Civilian Extraterritorial Jurisdiction Act in the last Congress, and I will soon introduce similar legislation this year.

Tragic events in Iraq in 2007 made clear the need to strengthen the laws providing for jurisdiction over American Government employees and contractors working abroad. In September 2007, Blackwater security contractors working for the State Department shot more than 20 unarmed civilians on the streets of Baghdad, killing at least 14 of them, and causing a rift in our relations with the Iraqi government.

Efforts to prosecute those responsible for these shootings have been fraught with difficulties, and our ability to hold the wrongdoers in this case accountable remains in doubt. Had jurisdiction for these offenses been clear, FBI agents likely would have been on the scene immediately, which could well have prevented the problems that have plagued the case.

Other incidents have made all too clear that the Blackwater case was not an isolated incident. Private security contractors have been involved in violent incidents and serious misconduct in Iraq and Afghanistan, including other shooting incidents in which civilians have been seriously injured or killed. In these cases too, there have not been prosecutions.

In the last Congress, the Senate Judiciary Committee heard testimony from Jamie Leigh Jones, a young woman from Texas who took a job with Halliburton in Iraq in 2005 when she was 20-years-old. In her first week on the job, she was drugged and gang-raped by co-workers. When she reported this assault, her employers moved her to a locked trailer, where she was kept by armed guards and freed only when the State Department intervened.

Ms. Jones testified about the arbitration clause in her contract that prevented her from suing Halliburton for this outrageous conduct, and Congress has moved to change the civil law to prevent that kind of injustice. Criminal jurisdiction over these kinds of atrocious crimes abroad, however, remains complicated, depending too greatly on the specific location of the crime, making prosecutions inconsistent and sometimes impossible. We must fix the law to help avoid arbitrary injustice and ensure that victims will not see their attackers escape accountability.

I worked with Senator Sessions and others in 2000 to pass the Military Extraterritorial Jurisdiction Act, and then again to amend it in 2004, so that U.S. criminal laws would extend to all members of the U.S. military, to those who accompany them, and to contractors who work with the military.

The next step is to establish clearly that all U.S. government employees and contractors who commit crimes while working abroad – whether they work with the military or not – can be charged and tried in the United States. As the military withdraws from Iraq and Afghanistan, the American presence in those countries will consist largely of civilian employees and contractors. There must be accountability for all of those who represent our Government overseas. And in those instances where the local justice system may be less fair, this explicit jurisdiction will also protect Americans by providing the option of prosecuting them in the United States, rather than leaving them subject to hostile and unpredictable local courts.

Ensuring criminal accountability will also improve our national security. Our allies, including those countries most essential to our counter-terrorism and national security efforts, work best with us when we hold our own accountable. We cannot afford the distrust created by employees and contractors acting with impunity and disregard for the rule of law, as so clearly happened in the Blackwater case. Moreover, the talented men and women we need to advance our national security efforts will be more likely to step forward and serve if we stamp out the lawless atmosphere in places like Iraq and Afghanistan. That is why the Civilian Extraterritorial Jurisdiction Act is supported by people like Ignacio Balderas, CEO of security contractor Triple Canopy.

In the past, legislation in this area has been bipartisan. I hope it will be again. I have been working with the Justice Department to make this legislation better and particularly to ensure that the legislation will be formulated in a way that will ensure criminal accountability, but will not impact the conduct of U.S. intelligence agencies abroad. I hope that we will be able to rapidly pass this important reform into law with bipartisan support. I look forward to hearing from our witnesses about how we can move forward on this important issue.

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QUESTIONS SUBMITTED TO MICHAEL J. EDNEY BY SENATOR GRASSLEY

[Note: At the time of printing, the Committee had not received responses from Michael J. Edney.]

Senate Committee on the Judiciary

Hearing on "Holding Criminals Accountable: Extending Criminal Jurisdiction to Government Contractors and Employees Abroad"

Questions for the Record

From Senator Charles Grassley

Questions for Michael J. Edney:

(1) Classified Information Procedures Act (CIPA)

In your written testimony, you state that applying a large number of criminal offenses to intelligence and national security operations under proposed CEJA legislation could create problems with the Classified Information Procedures Act (CIPA).

- What types of problems could be caused with CIPA? Please provide a hypothetical example if possible.
- If Congress were to pass CEJA legislation absent a carve-out for intelligence operations, should Congress include reforms to CIPA to protect classified information?
- What types of reforms would be necessary to fix the Classified Information Procedures Act?
- Even if CEJA were to include an intelligence carve-out, should it also include the proposed CIPA reforms you discuss? If not, why not?

QUESTIONS SUBMITTED TO HON. LANNY A. BREUER BY SENATOR GRASSLEY

Senate Committee on the Judiciary

Hearing on "Holding Criminals Accountable: Extending Criminal Jurisdiction to Government Contractors and Employees Abroad"

Questions for the Record

From Senator Charles Grassley

Questions for Assistant Attorney General Breuer:

(1) Resource allocations for Investigative Units:

In addition to extending federal criminal jurisdiction to contractors and employees overseas, the Civilian Extraterritorial Jurisdiction Act ("CEJA") of 2010, introduced in the 111th Congress, directed the Attorney General to assign personnel and resources through Investigative Units for Contractor and Employee Oversight to investigate allegations of criminal offenses by federal contractors and employees. The bill also authorizes "such sums to the Attorney General as are necessary to carry out the Act."

- How much taxpayer money does the Department of Justice believe is necessary annually to accomplish the creation of the "Investigative Units" outlined in the bill?
- If CEJA became law with the authorization listing "such sums…necessary to carry out the Act" what would the Department request in additional financial resources to implement CEJA annually?
- Considering the fiscal constraints the federal government currently faces, including the current federal hiring freeze, if Congress failed to appropriate additional monies to create the Investigative Units, would the Justice Department still create the new Investigative Units?
- If so, do you anticipate reducing the budgets for other divisions within DOJ to pay for these new units, and if so, can you describe what divisions? Absent additional funding, which budgets would you cut at the Department in order to create these new investigative units?

(2) Intelligence Carve-Out

CEJA as introduced in the 111th Congress did not include a carve-out or safe harbor for activities of the Intelligence Community or contractors employed by the Intelligence Community. Your written testimony states, "It is essential that any legislation include a statutory carve-out to ensure that the legislation does not impose criminal liability on authorized intelligence activities of the United States Government. The absence of the explicit exemption for authorize intelligence activities conducted abroad would negatively impact the United States' ability to conduct such activities." (Emphasis added).

- What restrictions should be placed on an intelligence carve-out? Should it be a blanket carve-out for all activities of the Intelligence Community?

- What is your definition of an "authorized" intelligence activity?

(3) Classified Information Procedures Act (CIPA)

In your testimony you stated that the Classified Information Procedures Act, may not be adequate to protect national security information, regarding cases involving the Military Extraterritorial Jurisdictions Act.

- Based on that statement, then you have to agree that the Classified Information Procedures Act is also not adequate to protect national security information in Civilian Extraterritorial Jurisdiction Act cases, correct? If not, what is the difference or distinction?

- Should any proposed CEJA legislation also include reforms to the Classified Information Procedures Act? If so, what reforms should Congress include? If not, why not in light of your statement that CIPA "may not be adequate to protect national security information and also establish to a jury beyond a reasonable doubt that a defendant is subject to MEJA."

(4) Knowledge of Operation Fast and Furious

- When and how did you first become aware of Operation Fast and Furious, either by name or as a large weapons trafficking case in Phoenix?
- When and how did you first become aware that the ATF implemented a strategy of allowing straw purchasers to continue to operate rather than interdicting weapons at the first opportunity?

(5) Mexico City Meeting

According to ATF whistleblowers, in the summer of 2010 you spoke at a briefing in Mexico City about an investigation the ATF was conducting showed promise to generate some positive results. Those present at the meeting interpreted your statements to refer to Operation Fast and Furious, which was being run out of the Phoenix Field Office.

- Did you speak about a Phoenix ATF investigation at a briefing in Mexico City anytime in 2010?
- Were you aware of any concerns by ATF personnel in Mexico about the numbers of guns being recovered in relation to a Phoenix ATF case? If so, please explain in detail.

(6) Title III Affidavits

As you know, documents show that individuals in your office approved applications for Title III affidavits in Operation Fast and Furious. Due to the details of the investigation provided within them, those affidavits would likely have made it clear that the ATF was not arresting these straw

buyers immediately, despite evidence that they were transferring firearms to criminals and traffickers.

- Do you believe that your office reads Title III affidavit applications carefully and in their entirety before approving them?
- If there were questionable investigative techniques evident in an affidavit application, do you believe your office would bring it to your attention before signing off under your name?
- Did you personally review the affidavits or receive any briefings on this case? If yes, were you concerned by any aspect of the case? If no, who did approve the affidavits related to Operation Fast and Furious?
- Have you since reviewed the affidavits? If not, why not? If so, do any of the facts raise concerns about the failure to interdict illegally purchased weapons at the first opportunity?

(7) Communication about ATF Cases

- Did you have any discussions with Ambassador Carlos Pascual about an ATF case out of Phoenix?

- If so, when did those discussions take place? Please describe them in detail.

- Prior to the public controversy, did you have any discussions with anyone at ATF or DOJ about Operation Fast and Furious, any similar Phoenix cases, or the strategy of allowing straw purchasers to continue to operate?

    - If so, when did those discussions take place? Please describe them in detail.

RESPONSES OF HON. LANNY A. BREUER TO QUESTIONS SUBMITTED BY SENATOR GRASSLEY

Questions for the Record Submitted to
Lanny A. Breuer
Assistant Attorney General
Criminal Division
Department of Justice

For a Hearing Entitled
"Holding Criminals Accountable: Extending Criminal Jurisdiction for Government Contractors and Employees Abroad"

Before the
Committee on the Judiciary
United States Senate

May 25, 2011

Questions Submitted by Senator Charles Grassley

Question 1: Resource allocations for Investigative Units:

In addition to extending federal criminal jurisdiction to contractors and employees overseas, the Civilian Extraterritorial Jurisdiction Act ("CEJA") of 2010, introduced in the 111th Congress, directed the Attorney General to assign personnel and resources through Investigative Units for Contractor and Employee Oversight to investigate allegations of criminal offenses by federal contractors and employees. The bill also authorizes "such sums to the Attorney General as are necessary to carry out the Act."

- How much taxpayer money does the Department of Justice believe is necessary annually to accomplish the creation of the "Investigative Units" outlined in the bill?

- If CEJA became law with the authorization listing "such sums...necessary to carry out the Act" what would the Department request in additional financial resources to implement CEJA annually?

- Considering the fiscal constraints the federal government currently faces, including the current federal hiring freeze, if Congress failed to appropriate additional monies to create the Investigative Units, would the Justice Department still create the new Investigative Units?

- If so, do you anticipate reducing the budgets for other divisions within DOJ to pay for these new units, and if so, can you describe what divisions? Absent additional funding, which budgets would you cut at the Department in order to create these new investigative units?

Answer: The Department of Justice does not support the establishment of Investigative Units by statute because it believes the Executive Branch is in the best position to determine how to investigate these cases based on a number of evolving factors. For instance, in places where a significant number of CEJA and Military Extraterritorial Jurisdiction Act ("MEJA") cases are anticipated, it may be appropriate to set up an investigative task force in the country at issue made up of United States Federal law enforcement. By contrast, in countries where only a few cases are anticipated and where United States domestic law enforcement has the necessary expertise and resources, United States Embassy law enforcement, augmented by domestic law enforcement as appropriate, may be best equipped to investigate any allegations of wrong-doing under CEJA.

Further, the amount of funds necessary to carry out the Act would depend on various factors, such as the number of contractors and employees being utilized by the United States Government at a particular time, whether such contractors and employees were employed by the Department of Defense or another agency, potential agreements with host countries regarding investigative and prosecutorial responsibilities, and the extent to which law enforcement resources of agencies other than the Department of Justice may be available.

Question 2: Intelligence Carve-Out

CEJA as introduced in the 111th Congress did not include a carve-out or safe harbor for activities of the Intelligence Community or contractors employed by the Intelligence Community. Your written testimony states, "It is essential that any legislation include a statutory carve-out to ensure that the legislation does not impose criminal liability on *authorized* intelligence activities of the United States Government. The absence of the explicit exemption for authorize intelligence activities conducted abroad would negatively impact the United States' ability to conduct such activities." (Emphasis added).

- What restrictions should be placed on an intelligence carve-out? Should it be a blanket carve-out for all activities of the Intelligence Community?

Answer: The proposed intelligence carve-out should be limited to authorized intelligence activities. The Executive Branch is not seeking, and the carve-out should not provide, immunity or an affirmative defense to an individual solely on the basis that the individual is working for or on behalf of the intelligence community.

- What is your definition of an "authorized" intelligence activity?

Answer: Several statutory carve-outs for authorized intelligence or law enforcement activities are already codified throughout the United States Code to avoid unintentionally prohibiting activities that are authorized in a manner consistent with applicable United States law and properly authorized by the conducting agency. The term "authorized" in this context refers to

activities that may be conducted by elements of the intelligence community pursuant to their authorities. It would include those intelligence activities that have been authorized by an appropriate official acting within the scope of his or her official duties under Federal law and consistent with any applicable Presidential directives. This definition of "authorized" necessarily includes activities undertaken by a person who, applying ordinary sense and understanding, believes that under the circumstances, the activity is authorized by an appropriate official of the United States, acting within the scope of the official's duties.

Question 3: Classified Information Procedures Act (CIPA)

In your testimony you stated that the Classified Information Procedures Act, may not be adequate to protect national security information, regarding cases involving the Military Extraterritorial Jurisdictions Act.

- Based on that statement, then you have to agree that the Classified Information Procedures Act is also not adequate to protect national security information in Civilian Extraterritorial Jurisdiction Act cases, correct? If not, what is the difference or distinction?

Answer: In MEJA prosecutions involving non-Defense Department personnel, the Government must prove to a jury that the defendant's employment "relates to supporting the mission of the Department of Defense overseas." To prove that element of the charged MEJA violation, evidence relating to the scope of the defendant's employment must be presented in court. However, the relevant details regarding the defendant's employment may be classified. In such cases, we use the Classified Information Procedures Act ("CIPA") to seek pretrial rulings on the use, relevance, and admissibility of classified information. In many cases, we will be able to use CIPA to obtain court orders allowing us to present suitable substitutions for the classified information that allow the Government to present the necessary evidence and limit any potential damage to the national security resulting from such use. However, in some cases the nature of the evidence will not allow for substitutions suitable to protect the Government's national security interests. In those cases, the court will order the disclosure of that classified information and the Government must decide whether it can disclose that information without harming national security. If the Government determines that it cannot disclose the information, it must decide whether it can proceed with the prosecution at all or whether it must dismiss the charges.

- Should any proposed CEJA legislation also include reforms to the Classified Information Procedures Act? If so, what reforms should Congress include? If not, why not in light of your statement that CIPA "may not be adequate to protect national security information and also establish to a jury beyond a reasonable doubt that a defendant is subject to MEJA."

Answer: We do not anticipate the same problem under CEJA. Because the Government would not have to prove the connection between the defendant's employment and the mission of the Department of Defense, the need to use classified information for proof at trial is minimized. To the extent that classified information still is implicated under CEJA, the nature of such evidence should be amenable to substitution, if necessary, pursuant to CIPA. If, at any time in the future, we learn (including through experience using CEJA) that the Government is required to disclose classified information to prove cases under CEJA, we would certainly wish to work with the Congress to address that issue.

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Written Testimony of Kristi Rogers
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Committee on the Judiciary, United States Senate

"Holding Criminals Accountable: Extending Criminal Jurisdiction to Government Contractors and Employees Abroad"

Chairman Leahy, Ranking Member Grassley, and the members of the Committee on the Judiciary, thank you for the opportunity to present testimony on the Civilian Extraterritorial Jurisdiction Act (CEJA). Aegis is appreciative of the Committee's efforts, through this hearing and legislation such as CEJA, to provide greater oversight, accountability, and transparency for the private security sector and the contingency contracting community. We are honored to have been asked to participate in this dialogue.

Aegis LLC and the worldwide Aegis Group is an active participant in the dialogue on contingency contracting reforms, both within industry and government, and has cooperated over many years with the GAO and the Special Inspector General for Iraq Reconstruction (SIGIR), has testified before the Commission on Wartime Contracting, provided comments and recommendations to the Center for a New American Security's "Contractors in Conflicts" report, and was a key driver of the effort to establish an International Code of Conduct for Private Security Providers. Aegis was proud to have been the first signatory of the Code in November 2010.

As the Committee is aware, contracting in contingency operations experienced rapid growth in the years since 9/11 in both Iraq and Afghanistan. Aegis has significant and detailed experience in both theatres, providing a variety of support and enabling services to government and commercial clients. Aegis' contract performance has been regularly applauded, including by the SIGIR in its 2009 audit report.

Aegis has also experienced the strengths and weaknesses of the contracting process. The contracting environment has improved, but much work remains to be done, and it is vital that the

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contracting agencies capture the lessons learned and best practices developed in today's contingency contracting environment and apply them, when necessary, in the future.

Aegis believes that contracting processes, structures, and operational procedures have yet to fully mature and match the complexities of today's operational challenges, particularly those related to assuring accountability, transparency, and oversight for the private security sector.

The success of current and future operations involving contractors requires effective frameworks in which to operate, with clearly defined objectives, measurable indicators of performance, and a robust system of oversight and accountability. Concurrently and equally as important, contingency contracting requires thorough and detailed advanced structures to ensure that the right contractors with the right skill-sets and the right personnel are hired for the mission.

Aegis fully supports the effort to hold civilian contractors accountable to the same standards as military and diplomatic personnel whether they are operating on Department of Defense or Department of State contracts in support of the U.S. mission overseas. Contractors are representatives of the U.S. Government when working abroad and should be held to the same legal and ethical standards as U.S. Government personnel.

About Aegis

I would first like to begin by providing a brief overview of Aegis and its work. Aegis LLC is a U.S. company and a member of the worldwide Aegis Group. Aegis provides government and corporate clients with a full spectrum of comprehensive intelligence-led, culturally sensitive security solutions to today's operational and development challenges around the world including stability operations, reconstruction and development, capacity building, and humanitarian assistance.

Aegis' focus is to provide appropriate support to enable our clients to carry out their missions in what are often hostile, complex, and austere environments. All of Aegis' work is executed in accordance with the highest standards of professionalism, accountability, and integrity. The success of our clients in multiple theatres is a testament to the strength of our management, the efficacy of our screening and vetting process, the thoroughness of our training, and the effectiveness of our unique approach to meeting our client's needs.

To date Aegis has successfully provided operational enabling and support services to numerous clients including the:

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- U.S. Army Corps of Engineers – Aegis provides security services, command, control, communications and intelligence support (C3I) support, operations support, Security Escort Teams (SETs), and Reconstruction Liaison Teams (RLTs) and civil affairs to enable the Corps' reconstruction mission in Iraq
- United States Forces-Iraq (USF-I) – Aegis provided direct personal security support to senior general officers enabling them to focus on their vital mission of training, advising, and transitioning security primacy to the Iraqi Security Forces
- United States Forces-Afghanistan (USFOR-A) – Aegis provides a robust and comprehensive static security solution, including C3I support, for USFOR-A at Shindand Airbase in Herat, Afghanistan
- Italian Government's Provincial Reconstruction Team – Aegis creates a secure operating environment through the provision of a static and mobile security element, and delivers Subject Matter Experts (SMEs) who integrate governance, economic redevelopment, outreach and engagement, education and health sector reform for Dhi Qar province, Iraq
- United Nations – Aegis directly supported the United Nations as it organized and facilitated firstly the referendum and then Iraq's first national and provincial elections, securing 19 locations and nine airfields
- Task Force for Business and Stability Operations (TFBSO) – Aegis provided the TFBSO with security support, SMEs, and liaison services to enable the Task Force's economic redevelopment program in Iraq

Aegis' Approach

Aegis' operational success is based on effective and strong leadership, high quality personnel, comprehensive business and management controls, close client partnerships, continuous quality control, and a thorough and detailed understanding of the client's mission and the environment in which the mission will take place.

Integrity and ethics are at the core of all of Aegis' business and operational activities. Aegis' employees, immediately upon hiring, are required to sign a Code of Conduct and Statement of Ethics, and regularly receive training in these areas. Aegis abides by stringent anti-corruption and whistle-blowing policies and has a zero tolerance for retaliation against employees who report violations and/or raise concerns about company policies and procedures. Aegis also has a company-wide "open door" policy in which employees can raise – at any time – concerns or issues with direct supervisors, thus ensuring continued communications and accountability.

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Aegis' development of these corporate values and its commitment to accountability, transparency, integrity, and ethics begins at the earliest stages of personnel recruitment. Each candidate, whether corporate or operational, is thoroughly screened and vetted to ensure that they share Aegis' values and commitment to operational excellence, and are suitable for the positions for which they are being considered.

Aegis' recruiting practices seek to select mature, seasoned, and qualified professionals for each of its missions. This careful deliberate recruiting, screening, and vetting process is particularly important for employees who will be working for clients in complex, austere, and hostile environments. Aegis continuously provides its employees with high quality region-specific training during which they are continually evaluated to ensure sustained performance.

The care and support of our employees is of paramount importance, and Aegis takes its duty of care to all employees – whether U.S., Third Country National, or Local National – very seriously. Each employee is not merely a member of staff, but a member of the team. Aegis provides its employees with high quality insurance and medical assistance should they become injured while on duty. Aegis also, recognizing the risks of traumatic stress, implemented an Aegis-unique program to provide employees with medical and psychological assistance should they find themselves in need of such support.

Ensuring Accountability and Oversight

Aegis believes that ensuring the accountability of contractors overseas is vital to maintaining good relations with the host governments and local populations of the countries in which the United States operates. Aegis strongly supports efforts to enhance accountability and oversight of contractor personnel operating on U.S. Government contracts, whether for the Department of Defense, the Department of State, or other agencies.

As a company, Aegis LLC and the Aegis Group are deeply committed to ensuring greater accountability, oversight, and transparency for the private security sector. Aegis actively ensures that all of its operations are compliant with international, U.S. or local law and requires similar compliance from all of its employees. Aegis welcomes the application of U.S. law to its employees in overseas theatres when contracted by the U.S. Government, and believes that doing so will be a positive influence and will redress many of the problems that have occurred to date.

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From our operational experience, we believe that the most effective measures to ensure accountability, mitigate risk, and limit the likelihood of malfeasance are those implemented at the earliest stages of operational activity and built into the program management and contract administration process.

Accountability of Personnel

The critical first step in ensuring that incidents do not occur is by recruiting and retaining high quality professionals. Aegis believes that successful accountability of personnel begins with thorough and in-depth screening and vetting of all candidates. Ensuring that candidates are of the highest caliber, thoroughly understand and share the mission, and understand the environment in which they will be operating, are critical steps to maintaining high standards and preventing incidents.

Training also serves as a vehicle for evaluation and selection. Aegis' believes that high quality, real-world training prepares employees for the stresses and rigors they will face in hostile and austere environments, and also allows Aegis' training personnel to remove individuals who show poor judgment, or are incapable of handling high-stress situations. The early identification of weaknesses and the removal of unfit candidates prevents incidents from occurring in the future.

Accountability is a continuous process. Employees will be dismissed for poor performance and/or any illegal activity. Upon hiring, Aegis' employees sign a statement of ethics and are regularly trained throughout the course of employment on ethics and accountability. Employees also understand that they could become accountable under the Military Extraterritorial Jurisdiction Act (MEJA).

Equally as important as the quality of the personnel, is the management structure and quality of program support employees receive. Aegis' program managers are highly experienced professionals who deeply understand the environment and the mission, and lead by example. Aegis' ethics are embedded at all levels of management from our executive leadership and corporate support personnel to the team leaders in the field, and onto the individual employees on the ground.

Aegis' culture of accountability and ethics ensures that all employees are aware of their personal and individual responsibilities and the responsibilities of Aegis to the client and the host country. Every employee knows and understands that his or her actions reflect directly upon Aegis, upon the client, and most importantly, upon the United States and its mission. While in theatre – both

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on and off mission – Aegis maintains the highest standards of personal and professional responsibility to ensure that their behavior or conduct does not affect the mission. Aegis holds its personnel to the same standards as its Department of Defense and Department of State counterparts, including applying General Order #1 to all U.S. Government contracts.

Selection of Contractors

Screening and vetting is equally as applicable to the contracting companies as it is to the personnel they employ. Ensuring that only qualified companies, with demonstrated records of superior past performance and a commitment to accountability and transparency are awarded contracts is critical to ensuring the delivery of high quality services.

Aegis recommends the pre-screening of companies or the establishment of a "pre-certification process" to ensure that only properly structured, legitimate, and legally responsible companies are able to support sensitive contingency operations. By establishing minimum standards of licensing, requiring commitment to accepted international standards such as the International Code of Conduct, and mandating minimum levels of past performance prior to the awarding of a contract, the U.S. Government can further strengthen the accountability and oversight of companies and improve the quality of services delivered.

Aegis also recommends the utilization of "Best Value" over "Lowest Price, Technically Acceptable" determinations when awarding contracts. Unquestionably, the U.S. Government should pursue the best service at the best price, but the selection of contractors according to cost alone has led to unnecessary risks and poor performance. In our opinion, companies who pursue this strategy invariably cut corners, offer lower salaries, and consequently fail to recruit the highest quality professionals. This initial misstep has significant long-term consequences for the U.S. Government that often become readily apparent on the front pages of leading newspapers.

By pursuing an award strategy of "Best Value" the government will ensure that it is receiving the best quality services at sensible, economic prices and not merely the cheapest service which meets the minimum requirements.

Contract Performance and Monitoring

Aegis believes that ensuring accountability and oversight is most readily done through the use of the U.S. Department of Defense and the U.S. Department of State's Inspectors General and

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through the application of the provisions of the Federal Acquisition Regulations and Defense Federal Acquisition Regulations.

Government contracting agencies today possess robust and effective tools to identify malfeasance and hold contractors accountable for poor performance, however these agencies often fail to use these tools. Most notable amongst these tools is the "suspension and debarment" of contractors. Recently, the Commission on Wartime Contracting identified this very issue in its second interim report, stating "Agencies do not use the suspension-and-debarment processes to full effect" adding that agencies often do not pursue this process, preferring to "enter into administrative agreements with the problematic contractor," citing the complexity of the process as a reason for not doing so.

Aegis believes that if the contracting agencies were to hold the poor performers accountable for their actions using the suspension and debarment tools, contractors would certainly adjust their performance, reform their activities, and ultimately improve the quality of services delivered to the U.S. Government.

Contingency Contracting Reforms

Contracting in contingency environments requires a different set of processes and procedures from peacetime contracting. While progress has been made in adapting the structures, improvements could still be made to ensure the delivery of high quality services to the U.S. Government, increase contractor accountability, and to provide greater oversight and transparency for the contracting process. Aegis offers five recommendations:

1. Increase the length of tours of contracting officers to develop familiarity and experience with the programs they are overseeing and to establish institutional memory and knowledge.
2. Require that contracting officers be located at the place of performance of the contracts they are overseeing, or in the same operational theatre.
3. Establish a Center of Excellence for contingency contracting to capture lessons learned, identify best practices, and recommend changes to the contracting space.
4. Integrate the use of private security contractors into Department of Defense and Department of State planning, strategy, and exercises to increase familiarity, enhance communications, and identify potential gaps or weaknesses in advance of contingency operations.

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5. Pre-qualify / "license" companies based on accepted professional standards, compliance, adherence to international codes and financial capability such that competition is retained, but between relevant qualified participants who will only add value to contingency operations, note pose risks to the Government's mission.

Conclusion

We would like to thank the members of the Senate Committee on the Judiciary, in particular, Senator Leahy and Ranking Member Grassley for the opportunity to present Aegis' perspective on contractor accountability and to continue participating in this important discussion. Enhancing accountability, oversight, and transparency is critical to ensuring that the mistakes of the past are not repeated in the future. Aegis looks forward to continuing to participate in this dialogue.

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May 24, 2011

Senator Patrick Leahy
Chairman
Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
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Re: Submission of written testimony for the record for the May 25, 2011 hearing titled "Holding Criminals Accountable: Extending Criminal Jurisdiction to Government Contractors and Employees Abroad"

Dear Chairman Leahy:

I would like to submit a statement for the record in connection with the May 25, 2011 hearing titled "Holding Criminals Accountable: Extending Criminal Jurisdiction to Government Contractors and Employees Abroad."

As Chief Executive Officer of Triple Canopy, Inc., and as someone who served for over two decades in the U.S. military, I recognize the importance of holding individuals accountable for their actions. Accountability forces individuals to take ownership of their actions, and ensures discipline and order. When accountability does not exist, it creates a vacuum in which bad actors may continue their actions, and it creates alarm and concern among those of us who believe in the rule of law.

For this reason, I would like to state my support for the efforts of your committee to investigate this issue and determine what legislative action may be necessary to ensure proper accountability over U.S. Government contractors operating abroad. In particular, I would like to state my support for legislation such as Contractor Extraterritorial Jurisdiction Act (CEJA), which would make it clear that all U.S. Government contractor personnel may be held accountable for criminal acts committed abroad. We must put the question of accountability behind us, and instead focus on culpability.

Sen. Patrick Leahy
Chairman, Committee on the Judiciary
U.S. Senate
May 24, 2011
Page 2

I have included for the record with this letter a brief editorial post that I recently wrote, published on The Huffington Post, stating my support for CEJA and the efforts to resolve questions of accountability.

Once again, please accept my support, and I am hopeful that your committee's work will further discussion on the issue and bring about the much-needed legislation that will resolve the question of accountability over U.S. Government contractors.

Best Regards,

Ignacio Balderas
Chief Executive Officer
Triple Canopy, Inc.

Enclosure

OpEd

Triple Canopy / Ignacio Balderas, CEO

The failure to establish effective accountability over private security contractors (PSCs) hasn't just obscured important truths about how our nation secures its foreign policy -- it has allowed some reckless actors to repeatedly endanger this goal.

We now have a chance to firmly lay down the rules, punish violators and allow the professional PSCs who make me proud every day do the jobs they're trained to do. This is why I support The Civilian Extraterritorial Jurisdiction Act (CEJA), which will be reintroduced soon by Sen. Patrick Leahy, D-VT. The bill was originally introduced last year and goes further than the current law in holding contractors accountable and plugs potential legal loopholes that bad actors may take advantage of.

The truth is our nation and our allies depend on PSCs to meet their goals. Without PSCs and the mission flexibility we provide, crucial military personnel and assets would have to be pulled from the front lines to perform tasks such as guarding an embassy gate or checking IDs. This is not why we send our highly-trained soldiers overseas. Private security companies allow soldiers to do what only soldiers can do. And, already strained by repeated deployments, our troops would face even less time at home with their families amid more grueling rotations. Another benefit is that, despite the claims otherwise, PSCs in most cases save the government money, a fact established by a 2008 Congressional Budget Office analysis and a comprehensive 2010 Government Accountability Office report. With federal budgets tight, this fact should not be ignored.

There is no argument that a number of serious incidents involving PSCs have occurred. The lack of an effective legal framework for accountability only adds to the alarm and outrage these incidents cause. Bad actors put lives and critical work at risk and are then allowed to perform more government work, further straining the nation's difficult missions overseas. Those of us who take this work seriously know what's at stake, for ourselves, for those we protect, and most of all, for our country.

While Triple Canopy has been working diligently alongside U.S. Government officials performing critical work in distant war zones, I've committed us to fighting the good fight on behalf of regulators too. We were proud to help launch the International Code of Conduct for Private Security Service Providers, unveiled in Geneva, Switzerland, in 2010, establishing a global set of standards and launching efforts to create effective mechanisms for governance and oversight.

Our work on these issues has allowed us to pursue common goals with groups such as Human Rights First, a leading non-governmental organization committed to the rule of law and human dignity, and another supporter of Sen. Leahy's legislation. In matters as important as CEJA, we stand side-by-side with Human Rights First in its call for clear standards of accountability.

By establishing accountability, we can move on to culpability. We can be sure that safeguards are in place and that contractors who break the rules are punished while those that honor the rules are not. Ultimately, how we decide to address questions of accountability and culpability for these incidents must reflect the ideals that America offers: we must be fair, respect the rights of all parties, and seek only justice, free from the influence of politics. And I hope we'll move past the confusion and politicization when it comes to PSCs and begin to realize that done does not need to be a member of the military in order to serve our country.

If we do not take these steps, we'll get more of the same: more misunderstandings about what PSCs do, more contracts awarded to the rule-breakers, and more politicization in the vacuum of facts. In the absence of proper accountability, we put our country's ability to achieve our goals at risk, from the country's foreign policy to the lives of those on the ground.

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Commission on Wartime Contracting
In Iraq and Afghanistan

A Bipartisan Legislative Commission Established to Study Wartime Contracting

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May 24, 2011

The Hon. Patrick J. Leahy, Chairman
Committee on the Judiciary
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Washington, DC 20510

The Hon. Chuck Grassley, Ranking Member
Committee on the Judiciary
224 Dirksen Senate Office Building
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Dear Chairman Leahy and Ranking Member Grassley:

The Commission on Wartime Contracting strongly supports ensuring that contractors working on behalf of the United States Government are subject to U.S. criminal jurisdiction. In our second Interim Report to Congress, "*At What Risk? Correcting Over-Reliance on Contractors in Contingency Operations*," we state:

> United States criminal jurisdiction over non-DoD contractors and subcontractors operating overseas also remains uncertain. The United States clearly has criminal jurisdiction over DoD contractors supporting missions overseas through the Uniform Code of Military Justice (UCMJ) and the Military Extraterritorial Jurisdiction Act of 2000 (MEJA). However, constitutional concerns regarding the application of military law to civilians have generally led DoD to refrain from prosecuting contractors under UCMJ. Moreover, courts have so far declined to clarify the extent to which U.S. criminal jurisdiction under MEJA was also intended to apply to *civilian*-agency contractors and subcontractors.

Accordingly, we recommended that Congress "clarify that civilian-agency contractors operating overseas are subject to U.S. criminal jurisdiction."[1]

Ensuring that contractors can be held criminally accountable under U.S. law was also a principal—in fact, the first— recommendation of the Secretary of State's Panel on Personal Protective Services in Iraq, aka the Kennedy Panel. The Panel's report highlighted criminal jurisdiction *in October 2007* as an important issue for Congress, the Departments of State and Justice, and the Office of Management and Budget:

> The State Department should urgently engage with the Department of Justice and the Office of Management and Budget, and then with Congress, to establish a clear legal basis for holding contractors accountable under U.S. law.[2]

Despite the Panel's finding that "the legal framework for providing proper oversight of Personal Protective Services (PPS) contractors is inadequate"[3] and its citing the urgent need for the recommendation to be addressed, it remains unimplemented.

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[1] Commission on Wartime Contracting in Iraq and Afghanistan. Second Interim Report to Congress: "At what risk? Correcting over-reliance on contractors in contingency operations". Recommendation #27, Clarify that civilian-agency contractors operating overseas are subject to U.S. criminal jurisdiction.". February 24, 2011.
[2] Report of the Secretary of State's Panel on Personal Protective Services in Iraq. October 2007.

The Departments of Defense and State also recognized this as an urgent issue in 2007, and in their December 2007 "Memorandum of Agreement Between the Department of Defense and the Department of State on USG Private Security Contractors" state that the Secretaries of Defense and State shall "jointly develop and implement core PSC standards which will include at a minimum... A clear legal basis for holding USG private security contractors accountable under U.S. law"[4] and that "DOD and DOS will continue to work together to expedite the enactment of legislation to establish a clear legal basis for holding USG PSCs in Iraq accountable under U.S. law."[5]

This sense of urgency expressed in 2007 is only heightened now given the transition in Iraq from the Department of Defense to the Department of State. As we noted in two special reports to Congress, as U.S. military forces leave Iraq—taking with them some vital services well ahead of the final exit target of December 31, 2011—the Department of State will have no practical alternative to meet its continuing security and support needs in Iraq than by greatly increasing its contracting. This will result in the Department of State's hiring thousands more private security contractors.[6,7]

Despite the Kennedy Panel's urgent recommendation and the Departments of Defense and State agreement to support enactment of legislation, some contractors may still remain outside the scope of U.S. criminal jurisdiction. This fact has been echoed by many over the past few years, including the Congressional Research Service (CRS), which has issued several reports summarizing the patchwork of laws and statutes, including Special Maritime and Territorial Jurisdiction (SMTJ), the Military Extraterritorial Jurisdiction Act of 2000 (MEJA), and the Uniform Code of Military Justice (UCMJ), under which contractors can be held accountable:

> Despite congressional efforts to expand court-martial jurisdiction and jurisdiction under MEJA, some contractors may remain outside the jurisdiction of U.S. courts, civil or military, for improper conduct in Iraq or Afghanistan.[8]

In summarizing the various statutes under which contractors in Iraq could be held legally accountable under U.S. jurisdiction, CRS concludes that "some contractor personnel who commit crimes might not fall within the statutory definitions described below, and thus might fall outside the jurisdiction of U.S.

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[3] Report of the Secretary of State's Panel on Personal Protective Services in Iraq. October 2007.
[4] "Memorandum of Agreement Between the Department of Defense and the Department of State on USG Private Security Contractors". Signed December 5, 2007.
[5] "Memorandum of Agreement Between the Department of Defense and the Department of State on USG Private Security Contractors". Signed December 5, 2007.
[6] Commission on Wartime Contracting in Iraq and Afghanistan Special Report 3: Better planning for Defense-to-State transition in Iraq needed to avoid mistakes and waste. July 12, 2010
[7] Commission on Wartime Contracting in Iraq and Afghanistan. Special Report 4: Iraq — a forgotten mission? The United States needs to sustain a diplomatic presence to preserve gains and avoid waste as the U.S. military leaves Iraq. March 1, 2011
[8] Congressional Research Service, Report # R40991: "Private Security Contractors in Iraq and Afghanistan: Legal Issues." January 7, 2010.

criminal law, even though the United States is responsible for their conduct as a matter of state responsibility under international law and despite that such conduct might interfere with the ability of the Multi-National Forces in Iraq to carry out its U.N. mandate."[9]

Conclusion

Ensuring that all U.S. government contractors are subject to U.S. criminal jurisdiction should be a non-partisan issue for immediate action. Since 2007 the Congress, the Departments of Defense and State, CRS, and others have identified gaps in U.S. criminal jurisdiction, with the Department of State calling the existing legal framework "inadequate" and expressing a sense of urgency for dealing with the issue.

Introduced during the 111th Congress, the Civilian Extraterritorial Jurisdiction Act (CEJA) of 2010 (S. 2979 and H.R. 4567) was an attempt to address this issue. CEJA would extend U.S. criminal jurisdiction to federal contractors working outside of the United States. CEJA is similar to the MEJA Expansion and Enforcement Act of 2007, which passed the House of Representatives with 389 Representatives voting in favor of it in October 2007. A related bill was also introduced in the Senate by then-Senator Barack Obama.[10]

While the Commission understands that there are valid concerns with how the Civilian Extraterritorial Jurisdiction Act (CEJA) of 2010 might be applied, we urge Congress to continue to work through this issue and to come up with a path forward that will once and for all ensure that all contractors working on behalf of the United States Government are clearly subject to U.S. criminal jurisdiction.

Respectfully Yours,

Michael J. Thibault
Co-Chair, Commissioner

Christopher Shays
Co-Chair, Commissioner

[9] Congressional Research Service, Report # RL32419: "Private Security Contractors in Iraq: Background, Legal Status, and Other Issues" August 25, 2008

[10] Transparency and Accountability in Military and Security Contracting Act of 2007 (February 17, 2007) & Security Contractor Accountability Act of 2007 (October 4, 2007).

SUBMISSION FOR THE RECORD

May 26, 2011

The Honorable Gene L. Dodaro
Acting Comptroller General
U.S. Government Accountability Office
441 G Street NW
Washington, DC 20548

Dear Mr. Dodaro:

The Department of Defense (DOD) released a report in January 2011 that provided an assessment of the total value of DOD contracts that were entered into with contractors that have been convicted of, indicted for, or settled criminal or civil charges related to procurement fraud. The findings in this report are astounding and indicate that the federal government has paid more than $280 billion over the last three years to contractors who were found to be civilly liable for contract fraud or who settled civil fraud cases. This is in addition to another $682 million in contracts that were awarded to contractors who were convicted of criminal fraud against the U.S. government. Although DOD was the focus of this report, we do not think this problem is limited to DOD or its contractors. We are concerned that current suspension and debarment practices at federal agencies are failing to protect U.S. taxpayers from contractors who commit fraud or other misconduct.

We understand the GAO is currently examining a number of issues related to suspension and debarment of DOD contractors at the request of the Senate Armed Services Committee. We urge GAO to complete this review as expeditiously as possible, and we request that GAO expand its investigation to cover the top ten federal agencies that spend the most taxpayer dollars on contracts. As the military continues to reduce its presence in Iraq, we urge you to closely examine the practices of the Department of State, which is projected to more than double its reliance on private contractors operating in Iraq in the next year. In addition to the procurement fraud concerns raised in the DOD's initial report, we request that your investigation encompass other types of contractor fraud and misconduct, including possible violations of the Foreign Corrupt Practices Act and other unscrupulous conduct that may violate federal law. We urge the GAO to pay particular attention to the following questions:

(1) Does the Department of Justice (DOJ) coordinate with federal agencies as soon as it launches an investigation of a contractor, and how can information sharing be improved between DOJ and other federal agencies' suspension and debarment officers, as well as its procurement officers?

(2) Does the agency in question have a process for immediately investigating a contractor when an indictment is issued against a contractor or its employees?
(3) Are actions taken against the contractor as soon as there is a determination that the contractor is no longer determined to be responsible, or does the agency wait for the conclusion of a trial, settlement, or investigation by DOJ?
(4) Are suspension and debarment officers sufficiently trained and equipped to conduct investigations?
(5) Are suspension and debarment officers communicating with procurement officers regarding pending investigations of potentially irresponsible contractors?
(6) In addition to its statutory responsibilities to conduct routine contract audits and investigate allegations of misconduct by contractors, what should the Inspector General (IG) be doing to protect the interests of the taxpayers as far as debarments and suspensions are concerned? Does the IG aggressively investigate and/or audit contract awards to firms that are in a suspended or debarred status? If not, why?
(7) Are agencies refusing to take action against large contractors that may be "too big to fail?"
(8) If there is evidence of misconduct within a specific department or division, but not elsewhere in a corporation, are suspension and debarment officers considering action targeted at that department or division?
(9) When there is evidence of misconduct or knowledge of misconduct by top management, are suspension and debarment officers considering action against individual executives to protect the government's interests?
(10) Was the information presented in the DOD Contracting Fraud Report for FY 2006-2009 accurate and complete? Please provide comparable information for FY 2010 and 2011.
(11) The Defense Criminal Investigative Organizations (DCIOs) are identified as the sole sources for the information presented in the DOD Contracting Fraud Report. Did these organizations conduct the investigations that led to these fraud convictions/judgments, settlements, debarments and suspensions, or was that information derived from other sources? If so, please identify all of the other sources of the allegations that led to these convictions and judgments, if known, and please indicate if any of the original allegations came from IG or other audits, the DOD Hotline, or whistleblowers.

We realize the scope of this investigation is quite broad, and we look forward to working with your staff to develop a schedule for reporting your findings as soon as they become available. If you have any questions about this request, please contact Susan Rohol (202-224-9623) or Nick Podsiadly at (202-224-5225). Thank you in advance for your prompt attention to this matter.

Sincerely,

Al Franken
U.S. Senator

Chuck Grassley
Ranking Member

SUBMISSION FOR THE RECORD

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TRIPLE CANOPY
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May 24, 2011

Senator Patrick Leahy
Chairman
Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

Re: Submission of written testimony for the record for the May 25, 2011 hearing titled "Holding Criminals Accountable: Extending Criminal Jurisdiction to Government Contractors and Employees Abroad"

Dear Chairman Leahy:

I would like to submit a statement for the record in connection with the May 25, 2011 hearing titled "Holding Criminals Accountable: Extending Criminal Jurisdiction to Government Contractors and Employees Abroad."

As Chief Executive Officer of Triple Canopy, Inc., and as someone who served for over two decades in the U.S. military, I recognize the importance of holding individuals accountable for their actions. Accountability forces individuals to take ownership of their actions, and ensures discipline and order. When accountability does not exist, it creates a vacuum in which bad actors may continue their actions, and it creates alarm and concern among those of us who believe in the rule of law.

For this reason, I would like to state my support for the efforts of your committee to investigate this issue and determine what legislative action may be necessary to ensure proper accountability over U.S. Government contractors operating abroad. In particular, I would like to state my support for legislation such as Contractor Extraterritorial Jurisdiction Act (CEJA), which would make it clear that all U.S. Government contractor personnel may be held accountable for criminal acts committed abroad. We must put the question of accountability behind us, and instead focus on culpability.

I have included for the record with this letter a brief editorial post that I recently wrote, published on The Huffington Post, stating my support for CEJA and the efforts to resolve questions of accountability.

Once again, please accept my support, and I am hopeful that your committee's work will further discussion on the issue and bring about the much-needed legislation that will resolve the question of accountability over U.S. Government contractors.

Best Regards,

Ignacio Balderas
Chief Executive Officer
Triple Canopy, Inc.

Enclosure

SUBMISSION FOR THE RECORD

OpEd

Triple Canopy / Ignacio Balderas, CEO

The failure to establish effective accountability over private security contractors (PSCs) hasn't just obscured important truths about how our nation secures its foreign policy -- it has allowed some reckless actors to repeatedly endanger this goal.

We now have a chance to firmly lay down the rules, punish violators and allow the professional PSCs who make me proud every day do the jobs they're trained to do. This is why I support The Civilian Extraterritorial Jurisdiction Act (CEJA), which will be reintroduced soon by Sen. Patrick Leahy, D-VT. The bill was originally introduced last year and goes further than the current law in holding contractors accountable and plugs potential legal loopholes that bad actors may take advantage of.

The truth is our nation and our allies depend on PSCs to meet their goals. Without PSCs and the mission flexibility we provide, crucial military personnel and assets would have to be pulled from the front lines to perform tasks such as guarding an embassy gate or checking IDs. This is not why we send our highly-trained soldiers overseas. Private security companies allow soldiers to do what only soldiers can do. And, already strained by repeated deployments, our troops would face even less time at home with their families amid more grueling rotations. Another benefit is that, despite the claims otherwise, PSCs in most cases save the government money, a fact established by a 2008 Congressional Budget Office analysis and a comprehensive 2010 Government Accountability Office report. With federal budgets tight, this fact should not be ignored.

There is no argument that a number of serious incidents involving PSCs have occurred. The lack of an effective legal framework for accountability only adds to the alarm and outrage these incidents cause. Bad actors put lives and critical work at risk and are then allowed to perform more government work, further straining the nation's difficult missions overseas. Those of us who take this work seriously know what's at stake, for ourselves, for those we protect, and most of all, for our country.

While Triple Canopy has been working diligently alongside U.S. Government officials performing critical work in distant war zones, I've committed us to fighting the good fight on behalf of regulators too. We were proud to help launch the International Code of Conduct for Private Security Service Providers, unveiled in Geneva, Switzerland, in 2010, establishing a global set of standards and launching efforts to create effective mechanisms for governance and oversight.

Our work on these issues has allowed us to pursue common goals with groups such as Human Rights First, a leading non-governmental organization committed to the rule of law and human dignity, and another supporter of Sen. Leahy's legislation. In matters as important as CEJA, we stand side-by-side with Human Rights First in its call for clear standards of accountability.

By establishing accountability, we can move on to culpability. We can be sure that safeguards are in place and that contractors who break the rules are punished while those that honor the rules are not. Ultimately, how we decide to address questions of accountability and culpability for these incidents must reflect the ideals that America offers: we must be fair, respect the rights of all parties, and seek only justice, free from the influence of politics. And I hope we'll move past the confusion and politicization when it comes to PSCs and begin to realize that done does not need to be a member of the military in order to serve our country.

If we do not take these steps, we'll get more of the same: more misunderstandings about what PSCs do, more contracts awarded to the rule-breakers, and more politicization in the vacuum of facts. In the absence of proper accountability, we put our country's ability to achieve our goals at risk, from the country's foreign policy to the lives of those on the ground.